SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 300

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

vs.

SERGE RUBINSTEIN

ON WRIT OF CERITORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Joint Appendix

1 In United States District Court for the District of Columbia

SERGE RUBINSTEIN, 814 FIFTH AVE., NEW YORK CITY, PLAINTIFF

v.

JAMES P. MCGRANNERY, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

Complaint

(Filed December 30, 1952)

The plaintiff, Serge Rubinstein, respectfully alleges:

1. That this is an action for a declaratory judgment under the Declaratory Judgment Act (28 U. S. C. 2201) and for review under the Administrative Procedure Act (5 U. S. C. 1001, et seq.).

2. That the plaintiff, a native of Russia and now stateless, and his parents in 1918 fled from the country of his birth, Russia, to escape Communist persecution. That plaintiff arrived in the United States in 1935, was admitted for permanent residence on April 3, 1938, and has resided continuously in the United States since that time.

3. That the defendant is the Attorney General of the United States and is charged with the statutory duty to determine after appropriate hearings whether aliens are to be deported from the United States, and supervises the administration of the Immigration and Naturalization Service and the Board of Immigration Appeals.

4. That the plaintiff provides all the living expenses of his two minor citizen-children, ages six and seven, and also of his mother, a United States citizen over seventy years of age, who resides with him, and his aunt, a United States citizen who is also over seventy years of age.

5. That in April of 1939, the plaintiff took a Caribbean cruise for six to ten days on the S. S. *Kungsholm*, making a round trip from New York City.

6. That on April 23, 1947, plaintiff was convicted of violation of 50 App. U. S. C. 311 and sentenced to imprisonment for two and one-half years. United States v. Rubinstein, 166 F. (2d) 249.

7. That the plaintiff was thereafter served with a warrant of arrest in deportation proceedings issued by the District Director of the Immigration and Naturalization Service at Philadelphia.

8. That thereafter the plaintiff was accorded a deportation hearing on November 5, 1948.

9. That the Hearing Officer who presided at such first
2 hearing recommended that the warrant of arrest be cancelled and the proceeding terminated upon the ground that plaintiff's crime did not involve moral turpitude.

10. That the District Director at Philadelphia reviewed the aforesaid deportation order and although not authorized to do so, he filed a memorandum recommending deportation.

11. That thereafter without any request on the part of plaintiff, and contrary to his desires, the Commissioner of Immigration directed a hearing de novo.

12. That a rehearing was held on October 1, 1951.

13. That the rehearing was conducted by a presiding officer who was subject to the control and supervision of officials in the Immigration Service and in the Department of Justice who engaged in prosecuting and investigatory functions.

14. That the aforesaid presiding official was improperly influenced by the views of his superiors, including the District Director at Philadelphia, recommending deportation.

15. That the aforesaid hearing was required to be conducted under oath.

16. That the presiding officer administered a purported oath but was not authorized so to do by any federal or state law.

17. That the said rehearing was not authorized by law, was prejudicial to plaintiff, and was null and void.

18. That upon rehearing as aforesaid, the presiding officer recommended plaintiff's deportation upon the ground that his crime involved moral turpitude and was committed within five years after entry into the United States.

19. That upon appeal, the Board of Immigration Appeals ordered the plaintiff's deportation and referred the case to the Attorney General for review of the Board's decision. That the Attorney General affirmed the Board's decision.

20. That in reaching the conclusion to deport plaintiff, the defendant acting through his agents considered matters outside the record of hearing which was available to plaintiff and his counsel.

21. Upon information and belief, that defendant maintains a separate confidential file concerning plaintiff which is not available to plaintiff or his counsel.

3 22. Upon information and belief, that the defendant received many letters, telegrams and other communications urging plaintiff's deportation.

23. Upon information and belief, that defendant's attention was directed to newspaper columns urging plaintiff's deportation.

24. Upon information and belief, that defendant is in possession of confidential information relative to plaintiff which was not made available to plaintiff and his counsel.

25. Upon information and belief, that the deportation order herein was entered and plaintiff's case was considered by defendant and his subordinates in the light of unfavorable newspaper publicity and confidential information not disclosed to plaintiff.

26. That by reason of the foregoing, plaintiff was denied the rudimentary requirements of due process and elementary fairness, and the deportation hearing and order herein were null and void.

27. That plaintiff is not a citizen of any country and is now stateless.

28. That plaintiff has no residence or domicile in any country except the United States.

29. That plaintiff has no passport or other travel documents and has no right to enter any foreign country.

30. That the order of deportation herein does not specify the place to which the plaintiff is to be deported.

31. That the order of deportation entered herein is vague, and null and void.

32. That the defendant has not accorded plaintiff a hearing as to the place to which he is to be deported nor does he intend to grant him such hearing, although requested to so do.

33. That plaintiff has not been convicted of a crime involving moral turpitude.

34. That plaintiff is not subject to deportation.

35. That defendant is threatening to take plaintiff into custody for the purpose of deporting him and unless restrained will do so, causing plaintiff irreparable injury.

4 Wherefore, plaintiff prays for judgment declaring that

(a) The deportation hearing herein was unfair, null and void.

(b) The deportation order herein was null and void.

(c) That the plaintiff is not subject to deportation.

(d) Restraining the defendant from taking plaintiff into custody and deporting him.

(e) For such other and further relief as may be appropriate.

JACK WASSERMAN,
Attorney for Plaintiff,
Warner Building, Washington 4, D. C.

LEMUEL B. SCHOFIELD, Esq.,
EDWARD J. ENNIS, Esq.,
Of Counsel.

LEED THROUGH POOR COPY

In United States District Court

Motion for preliminary injunction

(Filed, December 30, 1952)

The plaintiff, by his attorneys, moves the court for an order granting a temporary restraining order and preliminary injunction against the defendant pending determination of this suit and until further order of the court upon the grounds and in accordance with the prayers set forth in the complaint and other papers filed herein.

JACK WASSERMAN,
Attorney for Plaintiff,
Warner Bldg., Washington 4, D. C.

LEMUEL B. SCHOFIELD, Esq.,
EDWARD J. ENNIS, Esq.,
Of Counsel.

5 In United States District Court

Affidavit

(Filed, December 30, 1952)

DISTRICT OF COLUMBIA,
City of Washington, ss:

Jack Wasserman, being duly sworn, deposes and says:

1. That he is one of plaintiff's attorneys in the above entitled action.

2. That as more fully appears from the complaint filed herein, the defendant has entered an order of deportation against plaintiff herein and is threatening to take him into custody for the purpose of deporting him.

3. That the defendant has been advised that plaintiff intends to seek judicial review of the order of deportation but has nevertheless advised plaintiff's attorneys that he plans to take plaintiff into custody.

4. That the plaintiff and his parents in 1918 fled from the country of his birth, Russia, to escape communist persecution. That plaintiff arrived in the United States in 1935 and has resided continuously in the United States since 1938—approximately 14 years. That he resides at 814 Fifth Avenue, New York, New York. That he provides all the living expenses for his citizen mother and citizen aunt, both over seventy, and his minor American-born children, age six and seven.

5. That defendant is seeking to deport plaintiff because of a violation of Section 11 of the Selective Service and Training Act of 1940 (50 U. S. C. Appendix 311) committed in 1943. Plaintiff can be deported only if the crime involved moral turpitude and if he has had a fair administrative hearing. Plaintiff believes that the crime did not involve moral turpitude and that he was not accorded a fair hearing for the reasons detailed in
6 his complaint and accordingly is seeking judicial review of these issues. That such judicial review is sought in good faith.

6. That if the defendant is not enjoined from proceeding under the order of deportation, plaintiff will be taken into custody and deprived of his liberty until such time as the proceeding has been determined.

7. That plaintiff will thereby be deprived of his ability to earn a living and support himself and his dependents and this court may be deprived of jurisdiction over the declaratory judgment action herein filed by plaintiff against defendant.

8. That plaintiff's removal from the United States will leave him without remedy.

9. That the plaintiff has resided in the United States for fourteen years and is being deported for a statutory offense committed some ten years ago. That he has been granted administrative bail during the entire administrative hearing herein. That the best interests of the United States will not be adversely affected by continuing to permit plaintiff to be at large. That there has been no suggestion by anyone that plaintiff is hostile in any manner to the Government of the United States or does not adhere to the principles of Democracy or has been engaged or is engaged or is likely to engage in any subversive activity or is engaged or is likely to engage in any criminal or reprehensible activities.

10. That in all similar cases, the defendant has authorized the continuation of bail for persons similarly situated during judicial review, and defendant's denial of the continuation of bail herein constitutes an abuse of discretion.

11. That as plaintiff has dependents as noted above, is gainfully employed and the president of several business corporations, his detention for any period will result in irreparable injury and damage to him and to the business interests of the corporations.
7 Wherefore he prays that a restraining order and a preliminary injunction issue enjoining the defendant from any action seeking to take him into custody or to remove him from the United States under the order of deportation herein.

(S) JACK WASSERMAN

[Jurat omitted in printing.]

In United States District Court

Proposed temporary restraining order and denial thereof

(Denied by Judge Pine, December 30, 1952, 4 p. m.)

Upon consideration of the application of the plaintiff for a restraining order pendente lite against the defendant, and it appearing to the court that the acts of the defendant threatening to take the plaintiff into custody and deporting him, and his refusal to permit plaintiff to be at large on bail pending judicial review, will subject the plaintiff to irreparable injury, and that the actions of the defendant should be immediately restrained, and there is no opportunity for delay to give a hearing to the defendant in advance of such restraining order without subjecting the plaintiff to irreparable injury and deprivation of his means of livelihood, It is, by this Court, this ------ day of December, 1952.

Adjudged and ordered, that the defendant, James P. McGranery, the Attorney General of the United States, and his subordinates, clerks and employees of every kind, be and they hereby are restrained and enjoined from taking any further steps with a view toward taking plaintiff into custody and/or deporting him until further order to be entered herein; Provided an injunctive undertaking in the sum of $250 be given and approved by the Court, and conditioned to pay such costs and damages as may be incurred or suffered by any party to this action who may be found to have been wrongfully restrained thereby, and provided further that this order shall expire on the ------ day of ----------, 195---- unless within said time it shall be extended for good cause shown for a like period, And it is further

8 Ordered and adjudged that the matter of the issuance of a preliminary injunction herein be set for hearing before the Motions Judge of this Court on the ------ day of ----------, 195---- at 10:00 o'clock in the forenoon, provided a copy of this order is served on defendant, James P. McGranery, on or before the ------ day of ----------, 195----

———— ————,
United States District Judge.

Signed on ----------, 195---- ------- M.

Undertaking for $250 approved and filed December ------, 1952.

———— ————,
Clerk.

By ———— ————,
Deputy Clerk.

Denied 4 p. m., December 30, 1952.

DAVID A. PINE,
U.S.D.J.

In United States Court of Appeals for the District of Columbia Circuit

January Term, 1953

No. 11665

Before EDGERTON, BAZELON *and* FAHY, Circuit Judges, in Chambers

Order

(Filed, January 5, 1953)

The Supreme Court having decided in Kristenson v. McGrath, 340 U. S. 16 (1950), that an action for declaratory judgment lies to test the validity of a final order of deportation, and it appearing to follow that the validity of an order of detention incidental to an order of deportation may be similarly tested;

It is ordered by the Court that this case be, and it is
9 hereby, remanded to the District Court for consideration of the question of detention in accordance with the principles applicable in habeas corpus proceedings, together with such other questions as may be before the Court; and

It is further ordered by the Court that the restraining order of this Court heretofore entered herein be, and it is hereby, continued in effect until further order of the District Court, and that the mandate issue forthwith.

Dated January 5, 1953.

PER CURIAM.

In United States District Court

Opinion

(Filed, January 23, 1953)

The plaintiff, Serge Rubenstein, an alien of Russian birth arrived in the United States in 1935 and was admitted for permanent residence on April 3, 1938. On April 23, 1947 plaintiff was convicted of violation of 50 U. S. C. app. § 311 and was sentenced to imprisonment for two and a half years. United States v. Rubenstein, et al. 166 F (2d.) 249. The indictment upon which plaintiff was found guilty charged him with the filing of false affidavits and conspiracy to file false affidavits for the purpose of evading the draft. Following certain administrative proceedings the Board of Immigration Appeals ordered plaintiff's deportation

and referred the case to the Attorney General for review of the Board's decision. The Attorney General affirmed the Board's decision. The deportation was ordered upon the ground that the crime for which plaintiff had been convicted involved moral turpitude and was committed within five years after plaintiff's entry into the United States.

By the complaint filed herein plaintiff asks a judgment declaring the deportation order null and void; that he is not subject to deportation; that the deportation hearing was unfair and that defendant be enjoined from taking plaintiff into custody and deporting him. On December 30, 1952 Judge Pine of this court denied plaintiff's request for a temporary restraining order expressing his belief that after arrest habeas corpus proceedings would afford plaintiff an adequate remedy. An appeal was taken from Judge Pine's order. The Court of Appeals for this
10 circuit heard counsel for defendant concede that plaintiff's detention was not required for public security reasons and on December 31, 1952, entered an order restraining the defendant from revoking plaintiff's bail and from taking him into custody and providing that such stay would expire at eleven o'clock a. m. on January 5, 1953, unless extended by further order of that court and on January 2, 1953, entered the following order:

"The Supreme Court having decided in Kristensen v. McGrath, 340 U. S. 162 (1950), that an action for declaratory judgment lies to test the validity of a final order of deportation, and it appearing to follow that the validity of an order of detention incidental to an order of deportation may be similarly tested;

"It is ordered by the Court that this case be, and it is hereby, remanded to the District Court for consideration of the question of detention in accordance with the principles applicable in habeas corpus proceedings, together with such other questions as may be before the Court; and

"It is further ordered by the Court that the restraining order of this court heretofore entered herein be, and it is hereby, continued in effect until further order of the District Court, and that the mandate issue forthwith."

In view of the expression of the Supreme Court in Kristensen v. McGrath referred to in the order of the Court of Appeals which has been quoted it is not doubted that the plaintiff may test the legality of the order of deportation as he does in this action in a suit for a declaratory judgment. It clearly appears that plaintiff who is not in custody may seek his remedy in this action and is not required as his only remedy to proceed through the writ of habeas corpus when and if he be arrested and detained.

The matter presently before the court is whether, pending final decision in his action for declaratory judgment, plaintiff has made

a sufficient showing to justify the court in granting a preliminary injunction restraining the defendant from arresting the
11 plaintiff and taking him into custody. It will be noted that the complaint is not under oath but is signed simply by an attorney for plaintiff. Plaintiff's motion for preliminary injunction is supported by the affidavit of the attorney who signed the complaint. An examination of such affidavit indicates that in large part it is not made upon personal knowledge but is in substance and effect a restatement of matters set out in the complaint. While plaintiff contends that the hearing which resulted in the order of deportation lacks due process no factual basis is shown which supports such contention. It appears that the only ground for his motion with substance is his view that the crime of which he was convicted did not involve moral turpitude.

Moral turpitude has been variously defined by the courts. Perhaps the definition more commonly accepted is that it describes an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. The courts have generally included crimes malum in se conspiracy, embezzlement, extortion, fraud, interference with military forces, larceny, libel and slander, perjury, receiving stolen property, receiving reward under color of office, robbery, swindling, use of mails to defraud, violation of espionage laws, violation of narcotics act, violation of prohibition law.

It has been defined to mean anything done contrary to justice, modesty, or good morals. It has been said that if one conspires against the public interest by agreeing to violate the law or some rule of public policy, the act involves moral turpitude. It has been said that the use of the word moral proceeding the word turpitude adds little meaning since turpitude means anything done contrary to justice, honesty, modesty or good morals. Courts have held that moral turpitude as used in criminal statutes is not limited in its meaning to offenses which are malum in se and may include those which are merely malum prohibitum, as the concept of moral turpitude depends upon the state of public morals, varying according to the times, as it involves violation of a rule
12 of public policy and morals. Many courts have held that crimes involving fraud are crimes which involve moral turpitude and this relates to statutes authorizing deportation of aliens who are charged with the commission of crimes described in statutes as involving moral turpitude. Likewise it has been said that conspiring to defraud a person by deceit involves moral turpitude within a statute authorizing deportation of aliens convicted of crimes involving moral turpitude. Where an alien was convicted of having concealed assets from the Trustees in Bank-

ruptcy the crime was defined to be one involving moral turpitude within the meaning of the Immigration Act 1917, Section 19, for which he could be deported. An alien convicted of making false statements regarding another alien's name and entry into the United States held convicted of crime involving moral turpitude within deportation act, 8 U. S. C. A. Sections 155, 414.

Jordan, District Director of Immigration and Naturalization v. De George, 341 U. S. 223 involved a deportation proceeding in which De George was being deported on the basis of his conviction of a crime involving moral turpitude. The crime charged was a conspiracy to defraud the United States of taxes on distilled spirits. It was held that the crime involved moral turpitude within the meaning of the Immigration Act of 1917, 8 U. S. C. Section 155 (a). The Supreme Court stated "Fraud is the touch stone by which this case should be charged. The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct."

It is well settled in the law that before a court will issue a preliminary injunction the movant must establish with reasonable certainty that he will be successful in the ultimate action. This principle is well stated in Hall Signal Co. v. General Ry. Signal Co., 153 Fed. 907. In that case the court stated the requirement in this manner; "It is a cardinal principle of equity jurisprudence that a preliminary injunction shall not issue in a doubtful case. Unless the court be convinced with reasonable certainty that the complainant must succeed at final hearing the writ should be denied." The doctrines of that case has been consistently fol-
13 lowed by the courts. See St. Louis Street Mach. Co. v. Sanitary Street Flushing Mach. Co., 161 Fed. 753; Atlantic & Gulf West Coast v. United States, 90 F. Supp. 554; Swack v. Kraus Bros. & Co., 97 F. Supp. 719; United States v. Libby, McNeil & Libby, 98 F. Supp. 601.

Considering the facts which are well pleaded and the principles of law involved it results that the plaintiff has failed to make a sufficient showing to justify the issuance of a preliminary injunction.

Plaintiff's motion for preliminary injunction will be denied. Counsel for defendant will present an appropriate order.

F. DICKINSON LETTS,
Judge.

In United States District Court

Order denying motion for preliminary injunction

(Filed January 23, 1953)

Upon consideration of the pleadings and the memorandum filed herein, and it appearing to the Court that plaintiff has not made

a sufficient showing to justify the issuance of a preliminary injunction, it is, this 23 day of January, 1953,

Ordered that the motion for preliminary injunction be, and it is hereby, denied.

F. DICKINSON LETTS,
Judge.

[Certificate of service omitted in printing.]

In United States District Court

Notice of appeal

(Filed January 24, 1953)

Notice is hereby given that plaintiff hereby appeals from the denial of the motion by plaintiff for a preliminary injunction herein and the failure of the District Court to
14 comply with the mandate of the Court of Appeals herein to determine the question of plaintiff's detention in accordance with applicable rules of habeas corpus.

JACK WASSERMAN,
Attorney for Plaintiff,
Warner Building, Washington 4, D. C.

Dated January 23, 1953.

In United States District Court

Stipulation designating record

(Filed January 27, 1953)

It is hereby stipulated by and between the attorneys for the respective parties herein that the record on appeal consist of the following:

1. Complaint.
2. Motion for Preliminary Injunction.
3. Application for Restraining Order.
4. Order denying Restraining Order.
5. Mandate of Court of Appeals.
6. Opinion of Judge Letts filed January 23, 1953, Denying Motion for Prelim'nary Injunction.
7. Order Denying Preliminary Injunction.
8. Notice of Appeal filed January 24, 1953.
9. Stipulation Designating Record.

In United States Circuit Court for the District of Columbia Circuit

No. 11683

Motion for restraining order

(Filed January 24, 1953)

Comes now the appellant and respectfully moves the Court for an order restraining the appellee and his successor, Hon. Herbert Brownell, Attorney General, from apprehending and detaining appellant pending appeal and decision of this Court from a denial filed January 23, 1953, of appellant's motion for a preliminary injunction.

1. On January 23, 1953, the District Court signed and filed an order herein denying appellant's motion for a preliminary injunction herein. As of 9 a. m., January 24, 1953, appellant's counsel has not seen or received a copy of said order, although the first mail of the day has been delivered to his office.

2. Appellee's successor, Herbert Brownell, as Attorney General is seeking to apprehend and detain appellant pursuant to a warrant of deportation which designates no country to which appellant shall be deported and without affording him a hearing upon the issue of physical persecution. On the night of January 23, 1953, agents of appellee's successor were outside appellant's home in New York ready to apprehend him.

3. On January 23, 1953, Judge F. Dickinson Letts, denied appellant's request for a stay pending appeal.

4. Notice of Appeal will be filed on January 24, 1953, and counsel will requisition the District Court file containing the order and opinion herein of Judge Letts together with the additional memoranda of law which were submitted to the Court below.

5. Appellant submits that the Court below did not comply with the mandate of this Court and determine the question of appellant's detention in accordance with applicable rules of habeas corpus and that it has not correctly ruled upon the motion for a preliminary injunction.

6. Appellant further submits that as a matter of discretion, this Court should grant a restraining order pending decision of the appeal which is being filed today.

Respectfully submitted.

JACK WASSERMAN,
Attorney for Appellant,
Warner Bldg., Washington 4, D. C.

16 In United States Court of Appeals for the District of Columbia Circuit

January Term, 1953

No. 11683

Before EDGERTON, BAZELON and FAHY, Circuit Judges, in Chambers

*Per curiam order granting motion for restraining order**

(Filed January 26, 1953)

This cause came on to be heard on appellant's motion for an order restraining the appellee from apprehending and detaining the appellant pending appeal from an order of the District Court entered January 23, 1953, which order denied appellant's motion for a preliminary injunction restraining the appellee from apprehending and detaining appellant pending determination of this suit.

It appears that

(1) By order of this court entered January 5, 1953, on appeal from denial of a temporary restraining order, this case was remanded to the District Court for consideration of the question of appellant's threatened and imminent detention, in accordance with the principles applicable in habeas corpus proceedings, together with such other questions as were before the court.

(2) Upon remand the District Court entered an order denying a preliminary injunction, in reliance on its opinion that the order of deportation under review was valid because a crime of which appellant had previously been convicted involved moral turpitude.

(3) Another question for consideration in a habeas corpus proceeding and therefore in this declaratory judgment suit (McGrath v. Kristensen, 340 U. S. 162) is whether Sections 242 (a) and 242 (c) of the Immigration and Nationality Act of 1952, Public Law 414, 82d Cong., 2d Sess., 66 Stat. 163 et seq., authorize or forbid the arrest and detention of appellant in the present circumstances. Without assessing any other pertinent
17 question, we think this a substantial one which must be determined on this appeal. Under Section 242 (a) the appellee may take an alien into custody pending administrative determination of deportability as provided in Section 242 (b), and may continue that custody "pending such final determination

*As amended by the Court's order of January 27, 1953.

of deportability." The only other authority for detention is Section 242 (c), which authorizes appellee to take an alien into custody during a specified period for the purpose of effecting departure. This section may be read as meaning that the period does not commence until after "a final order of deportation under administrative processes * * * or, if judicial review is had, then from the date of the final order of the court". Since the appellant was not in custody during the period of administrative determination, now completed, since the administrative order is now under judicial review, and since departure cannot be compelled pending judicial review, a substantial question arises whether the Attorney General may, absent the sort of security purpose contemplated by the Act, take appellant into custody before "the date of the final order of the court" upon judic'al review.

(4) As we noted in our order of December 31, 1952, counsel for the appellee have stated to the court that no injury to the public interest is to be anticipated from postponing the appellant's arrest.

It is therefore ordered by the court that the appellee be and he is hereby restrained until further order of this court from revoking the appellant's bail and from taking him into custody on a warrant of arrest for deportation; and

It is further ordered that the brief for the appellant on this appeal be filed on or before February 9, 1953, and the brief for the appellee on or before February 23, 1953, and that this appeal be set for argument February 27, 1953.

Dated January 26, 1953.

PER CURIAM.

Fahy, Circuit Judge, dissenting

Pending the appeal from the denial by the District Court of a preliminary injunction which was there sought
18 to restrain the Attorney General, appellee, from apprehending and detaining appellant, we are asked so to restrain the appellee, it being conceded that no injury to the public interest from a security standpoint is involved.

As I read the statute, Publlic Law 414, 82nd Cong., 2d Sess., 66 Stat. 163 et seq., particularly § 242(c), the Attorney General is authorized at this point in the deportation proceedings, which have progressed to a final administrative order of deportation, to detain appellant, release him on bond in an amount and containing such conditions as the Attorney General may prescribe, or release him on such other conditions as the Attorney General may prescribe. The warrant of deportation under which appellee now seeks to apprehend and detain appellant does not exhaust the

discretion reposed by these provisions in the appellee; and if after apprehension that discretion should be illegally exercised, or if appellant should otherwise be illegally detained, relief by writ of habeas corpus would be available to appellant. In these circumstances I would not now intervene by our injunctive process to restrain the Attorney General. Although McGrath v. Kristensen, 340 U. S. 162 (1950), holds that the declaratory judgment procedure, which appellant is pursuing, is available to test the legality of a deportation order, it does not follow that the equitable powers of this court need be exercised to restrain steps which at present, as they seem to me, accord with the statutory plan in deportation cases.

280605—53—— 2

United States Court of Appeals for the District of Columbia Circuit.

Filed June 11, 1953, Joseph W. Stewart, *Clerk.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11683

SERGE RUBINSTEIN, APPELLANT

v.

HERBERT BROWNELL, Attorney General of the United States, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 11, 1953

Mr. Edward J. Ennis, with whom *Mr. Jack Wasserman* was on the brief, for appellant.

Mr. Frank H. Strickler, Assistant United States Attorney, with whom *Messrs. Charles M. Irelan,* United States Attorney at time of argument, *William R. Glendon,* Assistant United States Attorney at time of argument, and *Robert M. Scott,* Assistant United States Attorney, were on the brief, for appellee. *Mr. Leo A. Rover,* United States Attorney, also entered an appearance for appellee.

Before EDGERTON, PROCTOR and BAZELON, Circuit Judges.

EDGERTON, *Circuit Judge:* On December 29, 1952, the then Attorney General issued an order for appellant Rubinstein's deportation. On the same day the Attorney General's subordinate the District Director of the Immigration and Naturalization Service ordered appellant's arrest. On December 30, 1952, appellant brought this suit against the then Attorney General for declaratory and injunctive relief. The present Attorney General has been substituted as appellee.

We are now reviewing the deportation order. We are reviewing only the District Court's denial of a temporary injunction to restrain the appellee from arresting the appellant.

Appellant is an alien whose deportation is sought because he was convicted[1] of filing and conspiring to file false affidavits in an attempt to evade the draft. He served his sentence of two years and six months for this crime. His complaint contends that the crime did not involve moral turpitude and therefore did not make him deportable,[2] and also that the deportation order is invalid for other reasons including lack of due process in the administrative proceedings. It asserts among other things that "defendant is threatening to take plaintiff into custody for the purpose of deporting him and unless restrained will do so, causing plaintiff irreparable injury." With the complaint appellant filed a motion for a temporary restraining order and a preliminary injunction. His counsel filed an affidavit that unless appellee is enjoined appellant will be deprived of liberty until the suit is over; that appellant was allowed bail during the entire administrative proceeding; that the interests of the United States will not be adversely affected by his continued liberty; and that no one has suggested that appellant is hostile to the government or likely to engage in subversive, criminal or reprehensible activities. Appellee has not denied any of these allegations.[3]

The District Court declined to issue a restraining order and Rubinstein appealed. On January 5, 1953, we remanded the case to the District Court "for consideration of the question of detention in accordance with principles applicable in habeas corpus proceedings, together with such other questions as may be before the Court." On January 23, 1953, the District Court denied a preliminary injunction. This court entered a temporary restraining order pending this appeal from that denial.

I.

We adhere to our ruling of January 5 that the legality of appellant's threatened and imminent detention may be tested in this suit by the principles that would be applicable in habeas corpus.

Heikkila v. *Barber*, 345 U.S. 229, decided March 16, 1953, is not to the contrary. Distinguishing *McGrath* v. *Kristensen*, 340 U.S. 162, and overruling decisions of this and two other Courts of Appeals,[4] the Supreme Court held that Heikkila could attack a deportation order only in habeas corpus because § 19 of the 1917

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[1] *United States* v. *Rubinstein*, 166 F. 2d 249 (2d Cir. 1948), *cert. denied*, 333 U.S. 868.

[2] Deportation was sought under § 19(a) of the Immigration Act of 1917, 39 Stat. 889, as amended, 54 Stat. 1238, 8 U.S.C. § 155(a). The parallel provision of the 1952 Act is § 241(a), 66 Stat. 204, 8 U.S.C.A. § 1251(a)(4).

[3] Appellee's counsel say in their brief that appellee has not yet determined whether to hold appellant in custody.

[4] Note 10, *infra*.

Immigration Act, 39 Stat. 890, under which the order was issued, "clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution." 345 U. S. at 234-235. The Court pointed out that it did "not consider the 1952 Act, 66 Stat. 163, which took effect after Heikkila's complaint was filed." (n. 4) The 1952 Act, which is the Immigration and Nationality Act, 66 Stat. 163, 8 U.S.C.A. § 1101 *et seq.*, took effect December 24, 1952,[5] before Rubinstein's complaint was filed and even before the order for his deportation was issued. All agree that the 1952 Act and not the 1917 Act governs this suit.

The 1952 Act and its historical background. Unlike the 1917 Act, § 242(b)(4) of the 1952 Act provides that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." Unlike the 1917 Act, §§ 242(c) and 242(e) of the 1952 Act expressly recognize that there may be "judicial review" of a final order of deportation. Section 242(c) provides that "the Attorney General shall have a period of six months from the date of such order, *or, if judicial review is had, then from the date of the final order of the court,* within which to effect the alien's departure from the United States . . ."[6]

"Judicial review" is not synonymous with habeas corpus[7] Nothing in § 242(e) restricts it to habeas corpus.

Section 242(b)(4) of the 1952 Act provides, in practically the same words as § 19(a) of the 1917 Act[8] which the Supreme Court construed in *Heikkila*, that "In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final" But as the Supreme Court said in *Heikkila*, "That the Attorney General's decisions are 'final' does not settle the question . . . Read alone, [the term] might refer to the doctrine requiring exhaustion of administrative remedies before judicial process can be invoked." (p. 233) The Court had repeatedly held, before 1917, that in immigration legislation the word "final" was "intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution." In *Heikkila* the Court held, "against this background of a quarter of a century of consistent judicial interpretation" before 1917, that § 19 of the 1917 Immigration Act "clearly had

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[5] § 407, 66 Stat. 281.

[6] Emphasis added.

[7] The Supreme Court said in the *Heikkila* case: "it is the scope of inquiry on habeas corpus that differentiates use of the writ from judicial review as that term is used in the Administrative Procedure Act." 345 U.S. at 236.

[8] 39 Stat. 890, as amended, 54 Stat. 1238, 8 U.S.C. § 155(a).

the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution" (pp. 234, 235);[9] that is to say, except in habeas corpus.

The 1952 Act has a very different background of judicial interpretation. In 1948, 1949, and 1950, three Courts of Appeals including this one ruled[10] that despite previous legislation making the Attorney General's deportation orders "final", they were subject to review under § 10 of the Administrative Procedure Act which Congress passed in 1946.[11] Throughout the time when Congress was considering and adopting the 1952 Act which we are construing, this was the unanimous view of the Courts of Appeals.

In dealing with other sorts of legislation, the Supreme Court had repeatedly held that the word "final" does not necessarily exclude, or limit to habeas corpus, judicial review of administrative action. *Estep* v. *United States*, 327 U.S. 114 (1946), is an example. Accordingly it had become common before 1952 for Congress, when it wished to preclude or restrict judicial review, to do so by express language and not to rely on the word "final". Section 601(e) of the Revenue Act of 1936, 49 Stat. 1740, provided that "The determination of the Commissioner of Internal Revenue with respect to any refund under this section shall be final and no court shall have jurisdiction to review such determination." A 1940 amendment of the World War Veterans Act of 1924, 54 Stat. 1197, 38 U.S.C. § 11a-2, provided that "the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision."[12] A 1941 Excess Profits Tax amendment, 55 Stat. 26, provided that certain determinations of liability by the Board of Tax Appeals (now the Tax Court of the United States) "shall not be reviewed or redetermined by any court or agency except the Board."

Section 360(c) of the 1952 Act itself provides, as to persons *seeking admission* to the United States, that "A final determina-

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[9] The Court added "the decisions have continued to regard this point as settled." (p. 235) But all citations except "Sunal v. Large, 332 U.S. 174, 177, n. 3 (1947)", date from before the passage of the Administrative Procedure Act in 1946. The cited *Sunal* footnote reads: "We therefore lay to one side cases such as *Bridges* v. *Wixon*, 326 U.S. 135, *Duncan* v. *Kahanamoku*, 327 U.S. 304, and *Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304, where the order of the agency under which petitioner was detained was not subject to judicial review."

[10] *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (3rd Cir. 1948); *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (3rd Cir. 1950); *Kristensen* v. *McGrath*, 86 U.S. App. D.C. 48, 179 F. 2d 796 (1949), *affirmed* in *McGrath* v. *Kristensen*, 340 U.S. 162 (1950); *Prince* v. *Commissioner*, 185 F. 2d 578 (6th Cir. 1950).

[11] 60 Stat. 237, 5 U.S.C. § 1001 *et seq.*

[12] *Van Horne* v. *Hines*, 74 U.S. App. D.C. 214, 122 F. 2d 207.

tion by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction *in habeas corpus proceedings and not otherwise*".[13] The fact that Congress said clearly what it meant in § 360(c) with regard to admission is strong evidence that it did not mean what it did not say in § 242(c) with regard to deportation.[14]

Legislative history of the 1952 Act. While the Act and its predecessor bills were pending, Congress considered and rejected proposals that would have had the effect of exempting deportation proceedings under the Act from review under § 10 of the Administrative Procedure Act.

In the 81st Congress, Senator McCarran introduced on April 20, 1950, a bill to revise the immigration and nationality laws. (S. 3455, 81st Cong., 2d Sess.) It provided in § 106 that "Notwithstanding the provisions of any other law—(a) determinations of fact by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court; (b) determinations of law by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court except through the writ of habeas corpus; and (c) the exercise of discretionary authority conferred upon administrative officers by this Act or regulations issued thereunder shall not be subject to review by any court."

In the 1st Session of the 82d Congress, a revised bill introduced by Senator McCarran (S. 716) and a bill introduced by Congress-

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[13] Emphasis added.

[14] Section 242(c) provides that "Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General *concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings* that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period." (Emphasis added.)

As the Second Circuit has held regarding practically the same language in § 242(a), this sentence "provides but an added statutory recognition of a basis for judicial review, not a limitation upon the power . . ." *United States ex rel. Yaris* v. *Esperdy*, 202 F. 2d 109, 112. (1) Read literally the sentence grants, and does not withdraw or restrict, authority to review. (2) It does not touch the subject of review, in habeas corpus or otherwise, of deportation orders, but relates only to review of "detention, release on bond, or other release" when the Attorney General is not proceeding with "reasonable dispatch" to effect a deportation. (3) The six-month period referred to, during which this sentence authorizes review of these matters, begins to run only after "a final order of deportation . . . or, if judicial review is had, then from the date of the final order of the court . . ." (4) So far if at all as the sentence in question may *imply* that the matters to which it refers, during the time to which it refers, may be reviewed only in habeas corpus, it implies that review of other matters and review at other times are not so limited.

man Walter (H.R. 2379) contained similar provisions, but a bill introduced by Congressman Celler (H.R. 2816) did not. There were joint hearings on these three bills. Representatives of the American Bar Association and many other organizations opposed restriction of judicial review and urged continued application of § 10 of the Administrative Procedure Act.[15] After these hearings a revised bill, S. 2055, introduced by Senator McCarran in the 1st Session of the 82d Congress; H. R. 5678, introduced by Congressman Walter in the 2d Session of the 82d Congress; and a revised bill, S. 2550, introduced by Senator McCarran in the 2d Session of the 82d Congress, all omitted the provisions of § 106 of the previous bills. The Immigration and Nationality Act as adopted omits them.[16]

During the House debate on April 24, 1952, Congressman Meader proposed to amend the bill by providing expressly that "the order of deportation shall be subject to review by any court of competent jurisdiction". (98 Cong. Rec. p. 4415) Congressman Walter, co-author of the bill, in opposing the amendment said (p. 4416): "Now, we come to this question of the finality of the decision of the Atorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned, but it is not final in that it is not the last remedy that the alien has. Section 10 of the Administrative Procedure Act is applicable. From that decision an appeal lies in the courts. . . . In view of the fact that every person who is ordered deported has all of these administrative processes available, plus an appeal to the court, plus the right to a writ of habeas corpus, I cannot conceive of a case where any injustice would be done by some capricious or arbitrary administrator." The Meader amendment was defeated.

In the Senate debate Senator McCarran said on May 22, 1952 (98 Cong. Rec. p. 5778): "The Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails now."

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[15] *Joint Hearings before the Subcommittees of the Committees on the Judiciary* on S. 716, H. R. 2379, H. R. 2816, 82d Cong., 1st Sess., pp. 144, 446, 536-7, 590-1, 617-18, 699, 735.

[16] The Senate Judiciary Committee's Report No. 1137, 82d Cong., 2d Sess., January 29, 1952, on S. 2550, said the omission of the provisions of the former bills restricting review to habeas corpus was (p. 28) "not intended to grant any review of determinations made by consular officers, nor to expand judicial review in immigration cases beyond that under existing law." "Existing law" at that date included the Administrative Procedure Act as it had been interpreted in 1948, 1949, and 1950 by the *Trinler, Kristensen* and *Prince* decisions, *supra*, note 10. It did not include the *Heikkila* case (1953) which overruled those decisions.

II.

In our opinion the appellant if he were under arrest, would be entitled to release in habeas corpus

To justify the proposed arrest the appellee relies on § 242(c) of the 1952 Act. We think it inapplicable. The six month period during which § 242(c) gives the Attorney General discretion to detain an alien who has been ordered deported begins to run "if judicial review is had, then from the date of the final order of the court". There has not yet been a final order of the court. The purpose of the detention authorized by § 242(c) is "to effect the alien's departure from the United States". All agree that departure cannot be effected while the deportation order is under review.

The appellee does not rely on § 242(a), which relates primarily to the period before a final administrative deportation order is issued. Read literally, it may relate only to that period. But Congress can hardly have meant to give the Attorney General no authority to arrest the alien, in any circumstances, during the present interval between the final administrative deportation order and the final order of the court. To avoid such a gap in the statute we read the arrest provisions of § 242(a) as applicable during this interval.

Section 242(a) authorizes the Attorney General to keep an alien in custody, release him on bond, or release him on conditional parole. The Attorney General arrested the appellant and released him on bond. It also authorizes the Attorney General "in his discretion" to revoke the bond or parole and take the alien into custody again. But discretion in this connection is a reasonable discretion, not an arbitrary and capricious one. *Carlson* v. *Landon*, 342 U.S. 524, was a habeas corpus case decided under a provision of the Internal Security Act of 1950, 64 Stat. 1010, 8 U.S.C. (Supp. V) § 156(a), which likewise authorized the Attorney General in his "discretion" to keep an alien in custody pending final determination of his deportability. The Court said: "Respondent filed returns defending his orders of detention on the ground that there was reasonable cause to believe that petitioners' release would be prejudicial to the public interest and would endanger the welfare and safety of the United States. . . . The Government does not urge that the Attorney General's discretion is not subject to any judicial review, but merely that his discretion can be overturned only on a showing of clear abuse. . . . When in the judgment of the Attorney General an alien Communist may so conduct himself pending deportation hearings as to aid in carrying out the objectives of the world communist movement, that alien may be detained. . . . This is a permissible delegation of

legislative power because the executive judgment is limited by adequate standards." 342 U.S. at 529, 540, 544. *United States ex rel. Yaris* v. *Esperdy, supra,* note 14, was a habeas corpus case under the Immigration and Nationality Act of 1952. The Second Circuit said: "When there has been a revocation and a rearrest on the warrant, the test on habeas corpus of the lawfulness of the resulting detention is whether under the prevailing circumstances the Attorney General exercised a sound discretion". The court ruled, rightly we think, that "an allegation in the return that the appellant was engaged in communist activities up to the time of his rearrest sufficiently refutes the claim that there was an abuse of discretion by the Attorney General in revoking his bail and taking him into custody". 202 F. 2d at p. 111.

The *Carlson* case governs this one. The assertions in his counsel's affidavit that appellant is not hostile to the Government or likely to engage in subversive, criminal, or reprehensible activities are undenied. As we noted in our order of January 26, 1953, appellee's counsel informed us that no injury to the public interest is to be anticipated from postponing appellant's arrest. There is no suggestion that he will flee or hide. Counsel suggest a desire to question him but do not show that he cannot be questioned without being arrested. The record shows no reason for the order of arrest, apart from the uncontradicted statements in the complaint that the original defendant, the former Attorney General, "received many letters, telegrams and other communications urging plaintiff's deportation" and his "attention was directed to newspaper columns urging plaintiff's deportation." Neither appellant's criminal record nor his unpopularity justifies imprisoning him. As far as the record shows, his arrest under §242(a) would be a clear abuse of discretion. We have shown that §242(c) does not authorize his arrest while judicial review of the deportation order is pending.

As we held on the former appeal, the question of detention must be decided in accordance with the principles applicable in habeas corpus proceedings. In accordance with those principles, the question of detention is entirely independent of the question who is likely finally to prevail in regard to the validity of the deportation order. If the order be upheld, that will not retroactively legalize a previous arrest. There is no occasion to balance equities. Even if there were, the record contains nothing that could outweigh the irreparable loss of personal liberty which would follow from an arrest.

In denying a preliminary injunction the District Court declared that the crime for which appellant had served a term involved moral turpitude. But this is only one of the issues raised by

the complaint, on which the validity of the deportation order will depend. To avoid piecemeal appeals, we shall not consider this issue until the others have been heard. The case is accordingly remanded to the District Court for further proceedings, with directions to issue a preliminary injunction restraining appellee from revoking appellant's bail and from taking him into custody on a warrant of arrest for deportation, pending final determination of this suit, unless the appellee shows to the court that there are adequate reasons for making the arrest.

Reversed and remanded.

PROCTOR, Circuit Judge, *dissenting*: The majority opinion holds that upon the present record the Attorney General has no authority to arrest Rubinstein while judicial review is pending and that an arrest would be a clear abuse of discretion. They conclude that the "question of detention must be decided in accordance with the principles applicable in habeas corpus proceedings." They remand the case for further proceedings, with directions to issue a preliminary injunction against the arrest of Rubinstein unless adequate reasons are shown.

It seems to me confusing, if not misleading, to involve the question of a preliminary injunction with the principles of habeas corpus. The District Court's authority to grant the injunction rests upon its general powers to preserve pendente lite its jurisdiction over the case or prevent irreparable injury. If I thought the present situation required a preliminary injunction I would put its issuance upon those grounds. However, I am convinced that there is no present need for such action. Therefore, in my opinion, the injunction directed by the majority is an unwarranted encroachment upon and interference with the authority and responsibility of the Attorney General. The practical effect of the injunction is to strip the Attorney General, during the period of judicial review, of his statutory authority to control and supervise an alien[1] who has been ordered deported, although, obviously, control and supervision are more essential after the order than before. As Judge Fahy points out in dissenting from the temporary restraining order of January 26, 1953 (J. A. 57), under section 242 (c) the Attorney General is authorized, when proceedings have progressed to a final order of deportation, to detain the alien, release him on bond in an amount and containing such conditions as the Attorney General may prescribe or release him on such other conditions as the Attorney General may prescribe; also

[1] Immigration and Nationality Act, 66 STAT. 208 § 242 (a) and (c), 8 U. S. C. A. § 1252 (a) and (c) (Supp. 1952).

the warrant under which the Attorney General now allegedly seeks to apprehend and detain Rubinstein does not exhaust that official's discretion under the statute.[2] It is significant too that although sections 242 (a) and 242 (c) seem to recognize that an order of deportation may be judicially reviewed, there is nothing to suggest any power in the court to interfere with the Attorney General's authority to supervise and control during the period of court review. This, I think, clearly implies that the power remains with the Attorney General. Doubtless, arbitrary arrest or detention by him could be challenged by habeas corpus, a speedy and simple remedy quite in contrast to the time-consuming procedure here, but so far there is no detention. Nor do I think the many allegations in the unsworn complaint and in the attorney's supporting affidavit, abounding in hearsay, inference and conjecture, justify any reasonable apprehension of arbitrary or abusive action.

As I view the matter, the critical question now is whether pending a final determination of the case a sufficient showing has been made to warrant an injunction against Rubinstein being taken into custody or detained by the Attorney General. I think not. Although it is charged that the deportation proceedings are lacking in due process and the deportation order is invalid, there is no substantial support for that position, unless it be that the crime of which Rubinstein was convicted did not involve moral turpitude. If it did, then under the applicable statute[3] it became the duty of the Attorney General, upon his warrant, to take Rubinstein into custody and deport him. Admittedly the deportation order is grounded upon Rubinstein's conviction, April 23, 1947, on five counts of an indictment for knowingly making false statements, and conspiring so to do, to avoid the draft, in violation of Selective Training and Service Act of 1940, § 11, 54 *Stat.* 894, 50 U. S. C. App. § 311 (1946 ed.), for which he served concurrent sentences of two years and six months' imprisonment. See *United States* v. *Rubinstein*, 166 F. 2d 249 (2d Cir.), *cert. denied*, 333 U. S. 868, 92 L. Ed. 1146 (1948). I do not doubt that these crimes involve moral turpitude. In essence they do not differ from the crime of perjury and subornation of perjury, which clearly do involve that element. *United States* v. *Schlotfeldt*, 109 F. 2d 106 (7th Cir. 1940); *United States* v. *Uhl*, 70 F. 2d 792 (2d Cir.), *cert. denied*, 293 U. S. 573, 79 L. Ed 671 (1934); *Masaichi Ono* v. *Carr*, 56 F. 2d 772 (9th Cir. 1932). Regardless of all else, the deportation order is supported by the indisputable

[2] This, I think, is true whether section 242 (a) or 242 (c) is read as controlling upon the Attorney General during the period of judicial review.

[3] Act of Feb. 5, 1917 § 19, 39 STAT. 889, 8 U. S. C. § 155 (a) (1946 ed.).

facts of the criminal conviction and imprisonment, established in the deportation proceedings, and the necessary legal conclusion, as I believe, that the crimes did involve moral turpitude. I therefore do not think any substantial question is presented to raise a reasonable belief that the plaintiff will prevail upon a final hearing. Accordingly a preliminary injunction or stay of any kind should be denied. *Hall Signal Co.* v. *General Ry. Signal Co.*, 153 Fed. 907 (2d Cir. 1907); *Zugsmith* v. *Davis*, 108 F. Supp. 913 (S. D. N. Y. 1952); *United States* v. *Libby, McNeill & Libby*, 98 F. Supp. 601 (D. Alaska 1951); *Atlantic & Gulf/West Coast* v. *United States*, 90 F. Supp. 554 (S. D. N. Y. 1950). See also *Pub. Serv. Comm'n* v. *Wis. Tel. Co.*, 289 U. S. 67, 70, 77 L. Ed. 1036, 1038 (1933); *Mass. State Grange* v. *Benton*, 272 U. S. 525, 71 L. Ed. 387 (1926); *Perry* v. *Perry*, 88 U. S. App. D. C. 337, 190 F. 2d 601 (1951); *Wing* v. *Arnall*, 198 F. 2d 571 (Em. App. 1952).

Finally, I suggest that it cannot be supposed the Attorney General will go forward with deportation pending final determination of judicial review. It is fair to assume that the present action of that officer is designed to reconsider and adjust the terms of Rubinstein's release in view of the deportation order. This assumption comports with assurance to the court by the Attorney General's counsel "that he has not at this point in the administrative proceedings determined whether the alien shall be detained, released on bond or released otherwise."

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1953.

No. 11,683

SERGE RUBINSTEIN, *Appellant*,

v.

HERBERT BROWNELL, Attorney General of the United States, *Appellee*.

United States Court of Appeals for the District of Columbia Circuit.

Filed June 11, 1953, Joseph W. Stewart, Clerk.

APPEAL FROM the United States District Court for the District of Columbia.

Before: Edgerton, Proctor and Bazelon, Circuit Judges.

LEED THROUGH POOR COPY

Judgment

THIS CAUSE came on to be heard on the original record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings and with directions to issue a preliminary injunction restraining appellee from revoking appellant's bail and from taking him into custody on a warrant of arrest for deportation, pending final determination of this suit, unless the appellee shows to the court that there are adequate reasons for making the arrest.

Per Circuit Judge Edgerton

Dated: June 11, 1953

Separate dissenting opinion by Circuit Judge Proctor.

United States Court of Appeals for the District of Columbia Circuit.

Filed Aug. 6, 1953, Joseph W. Stewart, Clerk.

No. 11,683

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SERGE RUBINSTEIN, *Appellant*,

v.

HERBERT BROWNELL, JR., The Attorney General of the United States, *Appellee*.

Designation of Record

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix.
2. Opinion.
3. Judgment.
4. This designation.
5. Clerk's certificate.

/s/ Robert L. Stern
ROBERT L. STERN
Acting Solicitor General
Attorney for Appellee

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing designation of record has been mailed to Messrs. Jack Wasserman and Edward J. Ennis, Warner Building, Washington 4, D. C., Attorneys for Appellant.

/s/ Robert L. Stern
ROBERT L. STERN
Acting Solicitor General
Attorney for Appellee

August 6, 1953

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages, numbered 1 to 37, both inclusive constitute a true copy of the joint appendix to the briefs of the parties and of the record and proceedings in the said Court of Appeals, as designated by counsel for appellee, in the case of:

No. 11,683

SERGE RUBINSTEIN, *Appellant,*

v.

HERBERT BROWNELL, Attorney General of the United States, *Appellee.*

No. 11,683 . . . APRIL TERM, 1953, as the same remain upon the files and records of said Court of Appeals.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this eleventh day of August, A. D. 1953.

SEAL

JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia Circuit.

By WILLIAM G. SECREST
Deputy Clerk.

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33 Supreme Court of the United States

No. 300, October Term, 1953

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

SERGE RUBINSTEIN

Order allowing certiorari

Filed November 9, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1953

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No.

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

SERGE RUBINSTEIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, conditionally directing the United States District Court for the District of Columbia to issue an injunction restraining respondent's arrest pending final determination of his action for a declaratory judgment to review a deportation order.

OPINION BELOW

The opinion in the Court of Appeals (R. 19-29) is not yet reported. A prior opinion of that Court in the case appears at pp. 16-18 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on June 11, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*, pp. 21-29.

QUESTIONS PRESENTED

1. Whether deportation orders issued after the new Immigration and Nationality Act became effective are judicially reviewable other than in habeas corpus proceedings.

2. Assuming the answer to question (1) to be in the affirmative, whether, where an alien institutes an action for judicial review of a deportation order within six months after the issuance of the order, a court has authority to enjoin the Attorney General from taking the alien into custody pending determination of the action.

STATEMENT

On December 29, 1952, an order of deportation was issued against respondent under Section 19(a) of the Immigration Act of 1917, 39 Stat. 889, as amended, on the ground that he had been convicted of a crime involving moral turpitude committed within five years after entry into the United States. Petitioner, who was allegedly admitted to the United States for permanent residence in 1938 and who had last entered this country in 1939 (R. 1) was convicted in 1947, on a charge of filing and conspiracy to file false affidavits in 1943 in order to

evade military service under the Selective Service and Training Act of 1940. *United States* v. *Rubinstein*, 166 F. 2d 249 (C.A. 2), certiorari denied, 333 U.S. 868.

The day after the order of deportation was issued, respondent filed a complaint (R. 1-4) in the United States District Court for the District of Columbia, under the Declaratory Judgment Act (28 U.S.C. 2201) and the Administrative Procedure Act (5 U.S.C. 1001, *et seq.*), against James P. McGranery, then Attorney General, praying for a judgment declaring the deportation order invalid and enjoining the Attorney General from taking respondent into custody (R. 4). *Inter alia*, the complaint alleged that respondent's crimes did not involve moral turpitude and that he had been denied due process in the administrative proceedings (R. 3). Respondent accompanied his complaint with a motion for a preliminary injunction to restrain the Attorney General from taking respondent into custody pending determination of the suit (R. 4-7). Judge Pine denied the motion (R. 7) and respondent appealed to the Court of Appeals. On January 5, 1953, the Court of Appeals, ruling that a declaratory judgment action lies to test the validity of a deportation order, remanded the motion to the District Court "for consideration of the question of detention in accordance with the principles applicable in habeas corpus proceedings" (R. 8-9).

After the remand, on January 23, 1953, Judge Letts denied the motion, stating that it is well set-

tled law that a court will not issue a preliminary injunction unless the movant establishes with reasonable certainty that he will succeed in the ultimate action; that the only ground for respondent's motion which might possibly be considered substantial was his contention that his crimes did not involve moral turpitude; and that this contention was without merit (R. 9-13).

On January 24, 1953, respondent again filed a notice of appeal, and moved for an order restraining petitioner from apprehending and detaining respondent pending determination of the appeal (R. 13-15). The court below granted the motion on January 26, 1953, with Judge Fahy dissenting on the ground that, as he read Section 242(c) of the new Immigration and Nationality Act, *infra*, pp. 24-26, the Attorney General was authorized to arrest respondent after the entry of the order of deportation and decide whether to detain him during the period of litigation. Judge Fahy felt that respondent's proper remedy was in habeas corpus if he was administratively ordered detained (R. 16-18).

In an opinion dated June 11, 1953, the Court of Appeals remanded the case to the District Court with directions to issue a preliminary injunction restraining petitioner from revoking respondent's bail and from taking him into custody under a warrant of deportation pending final determination of his action, unless petitioner shows "that there are adequate reasons for the arrest." In this connection, the court held that *Heikkila* v. *Barber*, 345

U.S. 229, sustaining the Government's contention that the finality clause of Section 19(a) of the Immigration Act of 1917, 39 Stat. 890, as amended, precluded judicial review of deportation orders otherwise than in habeas corpus proceedings was not controlling, since, according to the opinion, the language and legislative history of Section 242 of the new Act, *infra*, pp. 21-26, reflected a purpose of Congress to make other avenues of review available (R. 20-24). The court further held that Section 242 (c) of the new law, *infra*, did not authorize the detention of respondent for the reason that the six-month period during which the statute gives the Attorney General discretion to detain an alien who has been ordered deported begins to run "if judicial review is had, * * * from the date of the final order of the court"; that the purpose of such detention is "to effect the alien's departure from the United States"; and that departure can not be effected while a deportation order is under judicial review. However, since the court thought that it was hardly reasonable that Congress intended to preclude the Attorney General from arresting an alien, under any circumstance, during the period of litigation regarding the validity of a deportation order, it interpreted Section 242(a) of the new law, *infra*, pp. 21-22, to authorize detention during such period even though that subsection literally applies only to the detention and release of aliens during the period while their deportability is being administratively determined. The court concluded, however, that under *Carlson* v. *Landon*, 342 U.S.

524, respondent's detention could not be justified unless it was shown that he is likely to abscond or that he is a security risk, which he allegedly is not. (R. 25-27.) Accordingly, it directed the issuance of an injunction against arresting respondent unless adequate reason for such arrest were shown. Judge Proctor dissented (R. 27-29), for the reasons generally speaking, advanced by Judge Fahy (*supra*, p. 4) and Judge Letts (*supra*, p. 4).

REASONS FOR GRANTING THE WRIT

The court below, in directing that petitioner be restrained from taking respondent into custody, has held (1) that the Immigration and Nationality Act has subjected deportation orders to review by the courts in proceedings other than habeas corpus, e.g., as in this case, in an action for an injunction and a declaratory judgment; (2) that in such an action the Attorney General may be restrained from taking an alien into custody pursuant to Section 242(a) or (c) of the Immigration and Nationality Act; and (3) that the Attorney General's exercise of the discretionary power vested in him by Section 242 to detain an alien who has been ordered deported pending judicial proceedings challenging the deportation order may be reviewed by the courts. Each of these issues is of general importance in the administration of the Act. As to the second, the four judges of the court below who have taken a position have divided evenly.* However, if, as we contend, the court below erroneously

* Judges Edgerton and Bazelon constituting the majority, as opposed to Judges Fahy and Proctor, dissenting on separate occasions.

decided issues (1) or (2), we believe that issue (3) need not be decided in this case.

1. In *Heikkila* v. *Barber*, 345 U.S. 229, decided on March 16, 1953, while the instant case was pending decision in the court below, this Court held that under the provision of Section 19(a) of the Immigration Act of 1917, that in deportation cases "the decision of the Attorney General shall be final", deportation orders could be challenged in the courts only in habeas corpus proceedings. In the instant case, in which the order for respondent's deportation was issued after the Immigration and Nationality Act of 1952 became effective, the court below has found that in the new Act Congress intended to subject deportation orders to direct judicial review, as in an action for injunctive and declaratory relief.[1] The opinion of the court below, read as a whole, indicates that the court would not have directed the issuance of a preliminary injunction absent a holding that the district court had jurisdiction to review the deportation order in an action for an injunction.[2]

We submit that the court below misread both the 1952 Act and its history. It is practically decisive that in almost the identical words of the 1917 Act,

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[1] District courts generally have considered the rationale of *Heikkila* v. *Barber*, *supra*, applicable under the 1952 Act. *Mirabel* v. *Glover* (D.C. P.R., Civ. No. 8445), June 18, 1953; *Ng Wong Dung* v. *Brownell* (S.D. N.Y., Civ. No. 84-356), June 10, 1953; *Sursos* v. *Zimmerman* (E.D. Pa., Civ. No. 14913), March 31, 1953; *Hyun* v. *London* (S.D. Cal., No. 15693-T), July 17, 1953.

[2] Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52, in which this Court reversed the grant of a preliminary injunction where the district court lacked jurisdiction over the main action.

Section 242(b) of the 1952 Act provides that "in any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final." As this Court noted in *Heikkila* v. *Barber*, 345 U.S. at 233-234, " 'final', as used in immigration legislation, has a history, both in the statutes and in the decisions of this Court," and "Read against this background of a quarter of a century of consistent judicial interpretation", it has the effect of precluding judicial intervention in deportation cases except in habeas corpus proceedings made available by the Constitution.

However, the court below held that Section 242 (c) and (e) of the 1952 Act expressly recognizes that there may be "judicial review" of deportation orders. This change in Congressional purpose was found primarily in the provision of Section 242(c) that "the Attorney General shall have a period of six months from the date of such [deportation] order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States * * *."[3] Referring to this Court's distinction in *Heikkila* between habeas corpus and "judicial review as that term is used in the Administrative Procedure Act" (345 U.S. at 236), the court below held that by this oblique reference to "judicial review" Section 242 reflected a Congressional purpose to make deportation orders reviewable otherwise

[3] A similar reference to "judicial review" appears in Section 242(e).

than in habeas corpus (R. 21). Relying upon the statement in the report of the Senate Committee on the Judiciary, S. Rep. 1137, 82nd Cong., 2d Sess., p. 28, that the omission of the provision of former bills specifically restricting review to habeas corpus was "not intended * * * to expand judicial review in immigration cases beyond that under *existing law*" (emphasis supplied), the court below concluded that the words "existing law" referred to the decision of that court and of the Third and Sixth Circuits,[4] later reversed by this Court in *Heikkila* v. *Barber, supra*, to the effect that Section 10 of the Administrative Procedure Act had made deportation orders reviewable by the courts in proceedings other than habeas corpus (R. 22).

To the contrary, we think that on the face of Section 242(c) and (e) the references to "judicial review" are merely a recognition that the actual deportation of an alien is deferred while Federal courts examine deportation orders in habeas corpus proceedings, for the purpose of insuring that the authorized detention period shall not end until six months after the Attorney General becomes free to effect the alien's removal. There is not the slightest indication that in referring to "judicial review" Congress was drawing a precise technical distinction from habeas corpus, or that, in referring to "existing law", Congress was acqui-

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[4] *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (C.A. 3, 1948); *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C.A. 3, 1950); *Kristensen* v. *McGrath*, 179 F. 2d 796 (C.A. D.C. 1949), affirmed in *McGrath* v. *Kristensen*, 340 U.S. 162 (1950); *Prince* v. *Commissioner*, 185 F. 2d 578 (C.A. 6, 1950).

escing in the decisions of the Third, Sixth and District of Columbia Circuits which were later reversed *in Heikkila* v. *Barber, supra.* In fact, the evidence is to the contrary. Thus, in 1950, the Senate Committee on the Judiciary (which later reported the 1952 immigration legislation) issued its extensive report on *The Immigration and Naturalization Systems of the United States,* S. Rep. 1515, 81st Cong., 2d Sess., in which it stated (p. 629) that:

> * * * In a habeas corpus proceeding, based on a deportation case, the court determines whether or not there has been a fair hearing, whether or not the law has been interpreted correctly, and whether or not there is substantial evidence to support the order of deportation. Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service.

The quoted language reveals that as of 1950, *after* the decisions of the Third and District of Columbia Circuits which were reversed in *Heikkila,* the Senate Committee understood that under "existing law" habeas corpus was the exclusive method of challenging deportation orders in the courts. It also reveals, contrary to the assumption of the court below (R. 21), that the Committee understood that the Attorney General's findings must be supported by substantial evidence even in habeas corpus proceedings, thus indicating that by providing in Section 242 (b)(4) that "no decision of deportability shall be valid unless it is based upon reasonable,

substantial, and probative evidence" the Committee did not anticipate or intend that this language would make any changes in the reviewability of deportation orders.

For additional textual support, the court below relied upon the provision of Section 360(c) of the 1952 Act that "A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise." The court below interpreted this language as applying to exclusion cases generally and as indicating that where Congress desired to limit review to habeas corpus it did so specifically. In fact, this provision had an entirely different purpose and history. Under Section 503 of the Nationality Act of 1940, 54 Stat. 1171, persons claiming to be citizens or nationals of the United States, regardless of whether such persons were within or outside the United States, were given a special declaratory judgment procedure to obtain a judicial determination of their claims. The purpose of Section 360(c) of the 1952 Act is to make that judicial procedure unavailable to all persons outside the United States and to provide for the determination of the claims of limited groups of such persons by the Attorney General in administrative exclusion proceedings. In providing that such determinations of the Attorney General "shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise", Section 360(c) is

obviously intended to emphasize and make clear the withdrawal of the right to an independent judicial determination. It has nothing to do with ordinary exclusion cases as to which Section 236(c) provides, like the former exclusion statute, that the administrative decision shall be final.

Finally, the court below relied upon statements by Senator McCarran and Representative Walter as evidencing a Congressional purpose to make deportation orders reviewable otherwise than in habeas corpus proceedings (R. 23-24). In our brief in *Martinez v. Neelly* (No. 218, O.T. 1945), affirmed *per curiam* by an equally divided court at 344 U.S. 916, the pertinent portions of which were incorporated by reference into our brief in *Heikkila* v. *Barber, supra,* we set forth the full context of the statements relied upon by the court below in the instant case.

In brief, the Court of Appeals relied heavily upon the statement of Representative Walter (98 Cong. Rec. 4416) that:

> Now we come to this question of the finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned, but it is not final in that it is not the last remedy that the alien has. Section 10 of the Administrative Procedure Act is applicable. From that decision an appeal lies in the courts . . . In view of the fact that every person who is ordered deported has all of these administrative processes available,

> plus an appeal to the court, plus the right to a writ of habeas corpus, I cannot conceive of a case where any injustice would be done by some capricious or arbitrary administrator.

On its face, this statement is most persuasive because it was made in a successful attempt to defeat an amendment offered by Representative Meader to provide that "the order of deportation shall be subject to review by any court of competent jurisdiction." However, Representative Walter continued in the same statement to indicate that his conclusion quoted above was based upon a misunderstanding of the bill, for he added (still addressing himself to the Meader amendment):

> I am sure that if the gentleman will look at page 163, paragraph 46, he will find that the law as it was before the House adopted this amendment to an appropriation bill, has been reinstated and that the decision of the Supreme Court in the *Sung* case will be the law of the land when this code is adopted.

Paragraph 46 on page 163 of the bill (H.R. 5678, 82d Cong., 2d Sess.) upon which Representative Walter relied, repealed the paragraph of the Supplemental Appropriation Act, 1951 (64 Stat. 1044, 1048) which, following this Court's decision in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, provided that, "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Ad-

ministrative Procedure Act." Since the applicability of the judicial review provisions of Section 10 is completely independent of Sections 5, 7 and 8, it is clear that neither the *Sung* decision nor the quoted provision of the Supplemental Appropriation Act had anything to do with the judicial review of deportation orders, and that the issue is equally unaffected by the repeal of that provision. Moreover, Representative Walter's interpretation of "final" as referring only to the end of the administrative process is inconsistent with the long-established judicial interpretation of such "final" provisions.[5]

As we pointed out in our brief in *Martinez* v. *Neely, supra*, at pp. 40-44, Senator McCarran's statements that "The Administrative Procedure Act is made applicable to the bill," and that "the Administrative Procedure Act prevails now," read in context, presumably relates to administrative procedures. And this limited meaning is made

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[5] This misunderstanding was repeated on the same day in the House when Representative Meader offered an unsuccessful amendment to subject to judicial review the Attorney General's exercise of the detention powers conferred by Section 242(a). In opposing this amendment, Representative Walter again stated (98 Cong. Rec. 4414) that:

> I would like to call the attention of the gentleman to the fact that on page 163 of the bill, paragraph 46, you will find that what the gentleman seeks to accomplish has been written into the law and the decision of the Supreme Court of the United States in the case of United States versus Sung has been reinstated. The rider that was attached to the deficiency appropriation bill has been set aside through the repeal of that particular section. So the judicial review is provided in all of these cases, and the gentleman's amendment is surplusage.

clear by Senator McCarran's successful opposition to amendments offered in the Senate which would have made deportation and exclusion orders reviewable otherwise than in habeas corpus. The amendments were defeated after a discussion indicating that the Senate was unwilling to make such a change without detailed study of the review problem.

Finally, it is incredible that in such a comprehensive revision and codification as the Immigration and Nationality Act of 1952, Congress would have failed to make its purpose clear if it had desired to change the established and often criticized rule that deportation orders may be challenged only in habeas corpus proceedings. Not only did Congress fail to express such a purpose, but it used again the language of finality which historically has thus limited review of deportation orders, and it repeatedly rejected amendments which would have provided a different form of review.

The court below, therefore, has erred in holding that the District Court had jurisdiction to review in an action for injunctive and declaratory relief the order for respondent's deportation and, therefore, had power to restrain the Attorney General from taking respondent into custody pursuant to Section 242 of the 1952 Act.

2. Even assuming, *arguendo*, that Congress intended in the 1952 Act that habeas corpus should no longer be the exclusive method for review of deportation orders, we submit that Section 242(c) of that Act precludes the issuance of an injunction

restraining the Attorney General from exercising his discretionary powers as to the detention or release of an alien against whom a final order of deportation has been entered.

Section 242(c) clearly contemplates that upon the issuance of a deportation order, the Attorney General shall have discretionary authority to take an alien into custody and decide whether to detain him or release him on such conditions as the Attorney General may prescribe, and that the commencement of an action for review of a deportation order within six months after the issuance of the order, as was done here, can have no effect on that authority other than to extend the period during which it may be exercised until six months after the final judgment in the case, if the judgment sustains the deportation order. While the court below felt that the detention provisions of Section 242(c) are inapplicable while a deportation order is being challenged in the courts, it avoided any time gap in the Attorney General's detention powers by holding that the detention provisions of Section 242(a) apply during such review period (as well as during the administrative deportation proceedings). However, we consider it immaterial which subsection applies in determining whether a court may enjoin the Attorney General from even exercising his discretion. Under either subsection, we contend, that no court has authority to preclude the Attorney General, by injunction, from arresting an alien and making the initial decision as to whether he should be detained and the conditions of his re-

lease if his detention is not deemed necessary or desirable. In fact, such anticipatory review of the Attorney General's prospective exercise of judgment and discretion is so unusual as to find analogy only in the rule that one cannot enjoin a criminal prosecution. *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163.

As both Judges Fahy and Proctor pointed out in dissent (R. 18, 27-29), the statute obviously contemplates that, after a deportation order is issued, the Attorney General will reexamine the matter of detention in the light of the facts established at the deportation hearing and the situation presented by the existence of the deportation order. See also *Spinella* v. *Savoretti*, 201 F. 2d 364 (C.A. 5), certiorari denied, 345 U.S. 975, holding that a habeas corpus action seeking review of an order detaining an alien pending determination of deportability became moot when the order of deportation was issued. This is similar to the situation in criminal cases where bail pending appeal involves very different considerations from bail pending trial. Congress clearly intended that, in the first instance, the determination will be made by the Attorney General. For such purpose, the Attorney General is clearly empowered to hold the alien in custody while that determination is being made. Thus, in ordering that the Attorney General be restrained before he had an opportunity to act as contemplated by the statute, the court below acted contrary to the clearly expressed Congressional

intent to leave the decision, at least in the first instance, for the Attorney General's discretion.

Moreover, regardless of whether subsection (a) or subsection (c) of Section 242 is thought to apply, both subsections contain a new provision (which was not present in the 1950 Act which was before this Court in *Carlson* v. *Landon*, 342 U.S. 524) to the effect that "Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, * * * upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case." This language reveals on its face that, leaving aside the scope of review of the Attorney General's exercise of discretion (see *infra*, p. 19), Congress intends that such review shall take place only in habeas corpus proceedings. This reading is confirmed by the reports of the Senate and House Committees on the Judiciary, which in describing the detention provisions of Section 242(b) and (c) state that such determination by the Attorney General "shall be subject to judicial review *only* upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with reasonable dispatch * * *" (emphasis supplied). S. Rep. 1137, pp. 29, 31, H. Rep. 1365, pp. 57-58, both 82d Cong., 2d Sess.

Also, the fact that, even in habeas corpus proceedings, Congress has conditioned the power of

the courts to review the Attorney General's exercise of these detention powers upon a conclusive showing that he is not proceeding with reasonable dispatch, is persuasive that he may not be enjoined at the threshold of the performance of his duties—without even an allegation that he is not proceeding with reasonable dispatch.

3. The court below has held that the Attorney General's decision to detain an alien pursuant to Section 242(c) is reviewable by the courts to the same extent that his exercise of similar powers under the predecessor Section 23 of the Internal Security Act of 1950 was held to be reviewable in *Carlson* v. *Landon*, 342 U.S. 524. The Court of Appeals for the Second Circuit has arrived at the same conclusion in *United States ex rel. Yaris* v. *Esperdy*, 292 F. 2d 109. The government has taken a contrary position in the lower courts, in reliance upon the new provision in the subsections (a) and (c) of Section 242 of the 1952 Act that courts shall have power to review or revise the Attorney General's decisions with respect to the detention of an alien upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with reasonable dispatch. See *infra*, pp. 21, 25. However, since, for the reasons indicated above, the courts below were without jurisdiction to review in this action issues relating to respondent's deportation and in any event acted prematurely on the detention isue, we do not believe that there are presented for decision in this case any issues as to

the interpretation or validity of these provisions relating to the review of detention actions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

AUGUST, 1953.

APPENDIX

The Immigration and Nationality Act (Pub. Law 414, 82d Cong., 2d sess.) provides in pertinent part:

> Sec. 242. (a) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and

circumstances in the case of any alien to determine deportability.

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or

other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this Act.

(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to

effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section. The Attorney General is hereby authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section. Where no Federal buildings are available or buildings adapted or suitably located for the purpose are available for rental, the Attorney General is hereby authorized, notwithstanding section 3709 of the Revised Statues, as amended (41

U.S.C. 5), or section 322 of the Act of June 30, 1932, as amended (40 U.S.C. 278a), to expend, from the appropriation provided for the administration and enforcement of the immigration laws, such amounts as may be necessary for the acquisition of land and the erection, acquisition, maintenance, operation, remodeling, or repair of buildings, sheds, and office quarters (including living quarters for officers where none are otherwise available), and adjunct facilities, necessary for the detention of aliens. For the purposes of this section an order of deportation heretofore or hereafter entered against an alien in legal detention or confinement, other than under an immigration process, shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto.

Sec. 360. * * *

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate

of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identify has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States.

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009, provides in part as follows:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

* * * * *

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law,

interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Section 19 (a) of the Immigration Act of 1917, 39 Stat. 889, as amended, 8 U.S.C. 155 (a), provided that any alien found subject to deportation "shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final."

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 300

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

SERGE RUBINSTEIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion in the Court of Appeals (R. 17-27) is reported at 206 F. 2d 449. A prior order and opinion of that court in the case appears at pp. 13-15 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on June 11, 1953 (R. 27-28). The petition for a writ of certiorari was filed on August 28, 1953, and granted on November 9, 1953 (R. 31). The

jurisdiction of this Court is conferred by 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the Immigration and Nationality Act of 1952, deportation orders may be challenged in the courts otherwise than in habeas corpus proceedings.

2. If the answer to question (1) is in the affirmative, whether, after an alien commences an action in a District Court challenging the validity of an order for his deportation, a preliminary injunction may be issued to restrain the Attorney General from taking the alien into custody.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*, pp. 55-63.

STATEMENT

On December 29, 1952, an order of deportation was issued against respondent under Section 19(a) of the Immigration Act of 1917, 39 Stat. 889, as amended, on the ground that he had been convicted of a crime involving moral turpitude committed within five years after entry into the United States. Respondent, who was allegedly admitted to the United States for permanent residence in 1938 and who had last entered this country in 1939 (R. 1) had been convicted in 1947 on a charge of filing, and conspiracy to file, false affidavits in 1943 in order to evade military service under the Selective Training and Service Act of 1940. *United States* v. *Rubinstein*, 166 F. 2d 249 (C. A. 2), certiorari de-

nied, 333 U. S. 868. During the administrative deportation proceedings, respondent was released from custody under bond of $1,000.

The day after the order of deportation was issued, respondent filed a complaint in the United States District Court for the District of Columbia, under the Declaratory Judgment Act (28 U. S. C. 2201) and the Administrative Procedure Act (5 U. S. C. 1001, *et seq.*), against the then Attorney General, praying for a judgment declaring the deportation order invalid and enjoining the Attorney General from taking respondent into custody (R. 1-5). The complaint alleged, *inter alia,* that the crime of which respondent had been convicted did not involve moral turpitude and that he had been denied due process in the administrative proceedings (R. 2-3). Respondent accompanied his complaint with a motion for a preliminary injunction to restrain the Attorney General from taking respondent into custody pending determination of the suit (R. 4). The complaint alleged that "defendant is threatening to take plaintiff into custody for the purpose of deporting him" (R. 3), while an affidavit of counsel filed in support of the application for a preliminary injunction asserted that the detention of the plaintiff rather than a continuation of his release on bond would constitute an abuse of discretion (R. 5). Judge Pine denied the motion (R. 6) and respondent appealed to the Court of Appeals. On January 5, 1953, the Court of Appeals, ruling that a declaratory judgment action lies to test the validity of a deportation order, remanded the motion

to the District Court "for consideration of the question of detention in accordance with the principles applicable in habeas corpus proceedings" (R. 7).

After the remand, on January 23, 1953, Judge Letts denied the motion, stating that it is well settled law that a court will not issue a preliminary injunction unless the movant establishes with reasonable certainty that he will succeed in the ultimate action; that the only ground for respondent's action which might possibly be considered substantial was his contention that his crimes did not involve moral turpitude; and that this contention was without merit (R. 7-11).

On January 24, 1953, respondent again filed a notice of appeal, and moved for an order restraining petitioner from apprehending and detaining respondent pending determination of the appeal (R. 11, 12). The court below granted the motion on January 26, 1953, with Judge Fahy dissenting on the ground that, as he read Section 242(c) of the new Immigration and Nationality Act, *infra*, pp. 58-60, the Attorney General was authorized to arrest respondent after the entry of the order of deportation and decide whether to detain him during the period of litigation. Judge Fahy pointed out that respondent's proper remedy was in habeas corpus if he was administratively detained (R. 13-15).

In an opinion dated June 11, 1953 (R. 17-25), Judge Proctor dissenting (R. 25-27), the Court of Appeals remanded the case to the District Court with directions to issue a preliminary injunction

restraining petitioner from revoking respondent's bail and from taking him into custody under a warrant of deportation pending final determination of his action, unless petitioner shows "that there are adequate reasons for making the arrest." In this connection the court held that *Heikkila* v. *Barber*, 345 U. S. 229, sustaining the Government's contention that the finality clause of Section 19(a) of the Immigration Act of 1917, 39 Stat. 890, as amended, precluded judicial review of deportation orders otherwise than in habeas corpus proceedings, was not controlling, since the language and legislative history of Section 242 of the new Act, *infra*, pp. 55-60, reflected a purpose of Congress to make other avenues of review available (R. 18-24). The court held that Section 242(c) of the new law did not authorize the detention of respondent, for the reason that the six-month period during which the statute gives the Attorney General discretion to detain an alien who has been ordered deported begins to run "if judicial review is had, * * * from the date of the final order of the court" and no final order had yet been entered. The purpose of such detention, it said, was "to effect the alien's departure from the United States" and departure cannot be effected while a deportation order is under judicial review. However, since the court thought that it was hardly reasonable that Congress intended completely to preclude the Attorney General from arresting an alien during the period of court litigation regarding the validity of a deportation order, it interpreted Section 242(a) of the new law, *infra*,

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p. 55, to authorize detention during such period even though that subsection literally applies only to the detention and release of aliens during the period while their deportability is being administratively determined. The majority concluded that under *Carlson* v. *Landon*, 342 U. S. 524, respondent's detention could not be justified unless it was shown that he is likely to abscond or that he is a security risk (which he alleged was not the case). Judge Proctor dissented (R. 25-27), for substantially the reasons advanced by Judge Fahy and Judge Letts, (*supra*, p .4).

SUMMARY OF ARGUMENT

Under the Immigration and Nationality Act of 1952, deportation orders may be challenged in the courts only in habeas corpus proceedings. Therefore, the District Court lacks jurisdiction to review the order for respondent's deportation in this action under the Declaratory Judgment and Administrative Procedure Acts, and the court below erred in directing the issuance of a preliminary injunction restraining the Attorney General from taking respondent into custody pursuant to the deportation order. However, even if the deportation order is subject to judicial review in such an action, the issuance of such a preliminary injunction was precluded by Section 242 of the Immigration and Nationality Act under which the Attorney General's determination with respect to the detention or release of an alien may be revised by the courts only in habeas corpus proceedings.

I

Congress has provided in Section 242(b) of the Immigration and Nationality Act of 1952 that in deportation cases "the decision of the Attorney General shall be final." In *Heikkila* v. *Barber*, 345 U. S. 229, this Court held that identical language in the Immigration Act of 1917 precluded challenge of deportation orders in the courts except in habeas corpus proceedings, and made inapplicable the judicial review provisions of Section 10 of the Administrative Procedure Act which by their terms govern "Except so far as * * * statutes preclude judicial review."

In the *Heikkila* decision, it was pointed out that the term "final", as used in immigration legislation, has had a long history, "both in the statutes and in the decisions of this Court", precluding court intervention except only in habeas corpus proceedings. The reenactment of this finality provision in the 1952 Act alone compels the conclusion that deportation orders continue to be reviewable by the courts only in habeas corpus proceedings.

Only the most conclusive evidence of a contrary Congressional purpose would warrant disregard of the express statutory language and its accepted meaning and consequences. While the court below found such evidence in the legislative history of the 1952 Act, we submit that that history shows that Congress understood that deportation orders could be challenged only in habeas corpus proceedings and that it rejected amendments which would have

made deportation orders reviewable in an action such as respondent commenced in this case.

In the comprehensive 1950 report of the Senate Committee on the Judiciary (S. Rep. 1515, 81st Cong., 2d Sess.) entitled *The Immigration and Naturalization Systems of the United States,* and which embodies the Congressional understanding of existing law upon which the 1952 Act was predicated, it was stated that "Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service." It is significant that this statement was made after the Courts of Appeals for the Third and District of Columbia Circuits had held, in *United States ex rel. Trinler* v. *Carusi,* 166 F. 2d 457, and in *Kristensen* v. *McGrath,* 179 F. 2d 796, that Section 10 of the Administrative Procedure Act had made deportation orders reviewable by the courts in proceedings other than habeas corpus. Thus, there is no basis for the conclusion of the court below that when the 1952 report of the court below (R. 22) that when the 1952 report of the Senate Committee (S. Rep. 1137, 82nd Cong., 2d Sess.) on S. 2550 stated that the deletion of a provision which would have restricted review of deportation orders to questions of law "is not intended * * * to expand judicial review in immigration cases beyond that under existing law," the reference to "existing law" meant the Administrative Procedure Act as then interpreted by the Courts of Appeals. Rather, the two Senate committee reports read together, reflect a clear understanding that prior to the 1952 Act deportation orders could

be challenged only in habeas corpus proceedings and a purpose to continue that principle.

During the House debate, Representative Meader introduced an unsuccessful amendment which would have deleted the provision in Section 242(b) that the Attorney General's decision shall be "final" and would have provided that "the order of deportation shall be subject to review by any court of competent jurisdiction." In opposing the Meader amendment, Representative Walter stated that Section 10 of the Administrative Procedure Act was already applicable. However, Representative Walter explained that his conclusion was based upon Section 403(a)(47) of the Act which repeals the paragraph of the Supplemental Appropriation Act, 1951, which, following this Court's decision in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, provided that deportation and exclusion proceedings should be conducted "without regard to the provisions of sections 5, 7 and 8 of the Administrative Procedure Act." Since neither this provision nor its repeal by the 1952 Act has anything to do with the application of the judicial review provisions of Section 10 of the Administrative Procedure Act, it is clear that Representative Walter's statement was based upon a misunderstanding. Obviously, his statement cannot be relied upon in interpreting provisions of the statute upon which he did not rely for his conclusion.

During the Senate debates, Senators Lehman, Moo ly and Morse offered amendments which would have accomplished the result reached by the court

below. Each of these amendments was rejected. While the debate on these amendments tended to be confusing because some of them dealt with matters in addition to judicial review, it made clear that the Senate was unwilling to make changes in the review of deportation orders without further study and, in particular, that the Senate was unwilling to make exclusion orders reviewable otherwise than in habeas corpus proceedings, as contemplated by the Morse amendment.

While the court below found support for its conclusion in the incidental references to "judicial review" in Section 242(c) and (e) as indicating that Congress was drawing the precise distinction between "judicial review" and habeas corpus which this Court made in *Heikkila* v. *Barber, supra,* it is clear that Congress was simply recognizing that the actual deportation of an alien is deferred during judicial examination of the deportation order in habeas corpus proceedings. The court below also thought that Section 360(c) of the Act expressly limited review of exclusion orders to habeas corpus, from which it concluded that Congress did not intend to so limit the review of deportation orders. This deduction is erroneous in that Section 360(c) does not deal with exclusion cases generally, but provides a new and restrictive method by which persons without the United States can assert claims of American citizenship. Exclusion orders generally are governed by Section 236(c) which, like the exclusion provision of the 1917 Act which was before this Court in *Tom We*

Shung v. *Brownell,* decided December 7, 1953, provides that the administrative decision in exclusion cases shall be "final".

If the decision below stands, in the face of the command of Section 242(b) that the Attorney General's decision shall be "final", it will be arguable that exclusion orders also will be reviewable in proceedings other than habeas corpus. Since the legislative debates on the 1952 Act indicate that Congress was particularly unwilling to provide review otherwise than in habeas corpus for exclusion orders, this circumstance is a compelling practical reason for leaving the review of both deportation and exclusion orders to habeas corpus until Congress chooses to deal with the subject.

II

Even if the order for respondent's deportation may be reviewed by the courts in proceedings other than habeas corpus, Section 242 of the Immigration and Nationality Act precludes any judicial revision of the Attorney General's determination to detain or release on bond or other conditions an alien under order of deportation except in habeas corpus proceedings. It is immaterial whether the detention or release of an alien during the period in which he is challenging in the courts the order for his deportation is governed by Section 242(a) or (c), since both subsections contain substantially identical detention provisions.

Thus, the provision of Section 242(c) that any court shall have authority "to review or revise any

determination of the Attorney General concerning detention, release on bond, or other release during such six-month period *upon a conclusive showing in habeas corpus proceedings"* that the Attorney General is not proceeding with reasonable dispatch to effect the alien's deportation, indicates on its face the purpose of Congress that habeas corpus proceedings should constitute the exclusive method for challenging such determinations. It follows that Congress intended that the Attorney General's determination as to detention or release should be reviewed only after he has taken an alien into custody, rather than before by restraining him from taking the alien into custody at all. The exclusiveness of the habeas corpus remedy is emphasized by the fact that even in such proceedings Congress has limited judicial review of the Attorney General's detention decision to cases in which it is conclusively shown that he is not proceeding with reasonable dispatch. Regardless of the scope of review, however, it is entirely clear that Congress did not contemplate that the Attorney General could be compelled by preliminary injunction to justify in advance his prospective exercise of the discretionary power vested in him to determine whether aliens who have been ordered deported should be detained during the period authorized by Section 242.

The changes which Congress made in the detention provisions of Section 242, as compared with the antecedent provisions in Section 23 of the Internal Security Act of 1950 which were before this Court in *Carlson* v. *Landon,* 342 U. S. 524, clearly

indicate that Congress intended the Attorney General's determination with respect to detention or release to be unreviewable by the courts except upon a conclusive showing that the Attorney General was not proceeding with reasonable dispatch. Assuming, arguendo, that is consistent with the Congressional purpose to apply some other standard in reviewing such determinations as to detention during the period in which the deportation order is being reviewed by the courts, we suggest that the proper standard is that applied by the District Judge and by the dissenting judge below. That test is whether the underlying action challenging the deportation order presents a substantial question which creates a "reasonable belief that the plaintiff will prevail upon a final hearing." Applying that test to respondent's principal challenge to the order for his deportation, i.e., that his conviction for violation of the Selective Training and Service Act of 1940 did not relate to a crime involving moral turpitude, it is clear that there was no basis for restraining the Attorney General from taking respondent into custody pursuant to Section 242 of the Act.

ARGUMENT

I

Since the District Court Lacked Jurisdiction to Review the Order for Respondent's Deportation, the Court of Appeals Lacked Power to Direct the Issuance of a Preliminary Injunction Restraining the Attorney General from Taking Respondent into Custody.

This case arises out of an action instituted by respondent in the United States District Court for

the District of Columbia "for a declaratory judgment under the Declaratory Judgment Act (28 U.S.C. 2201) and for review under the Administrative Procedure Act (5 U.S.C. 1001, et seq.)" challenging the validity of an order directing the deportation of respondent (R. 1-3). The action of the court below, in directing the District Court to issue a preliminary injunction restraining the Attorney General "from revoking [respondent's] bail and from taking him into custody on a warrant of arrest for deportation, pending final determination of this suit" (R. 28), necessarily presupposes that the District Court has jurisdiction to review the order for respondent's deportation in an action for a declaratory judgment and for review under Section 10 of the Administrative Procedure Act. However, neither that court nor the Court of Appeals was empowered to issue or to direct the issuance of such a preliminary injunction because "there was an insuperable objection to the maintenance of the suit in point of jurisdiction." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 52. The "insuperable obstacle" here is that the validity of the order for respondent's deportation may be challenged only in habeas corpus proceedings, with the result that the District Court was without jurisdiction to determine respondent's action under the Declaratory Judgment and Administrative Procedure Acts.

A. *Under Heikkila v. Barber, 345 U. S. 229, the provision of Section 242(b) of the Immigration and Nationality Act that in deportation cases the decision of the Attorney General shall be "final", deprived the District Court of jurisdiction to review the order for respondent's deportation in an action under the Declaratory Judgment and Administrative Procedure Acts.*

On December 29, 1952, following administrative proceedings, the Attorney General ordered that respondent be deported. The Immigration and Nationality Act of 1952 had become effective on December 24, 1952. Section 242(b) of the 1952 Act provides that, "In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final." We contend that under the rationale of this Court's recent decision in *Heikkila* v. *Barber,* 345 U.S. 229, the command of the 1952 Act that in deportation cases the Attorney General's decision shall be "final" means that deportation orders may be challenged in the courts only in habeas corpus proceedings.

In *Heikkila* v. *Barber, supra,* an alien who had been ordered deported under the Immigration Act of 1917 sought judicial review of the deportation order in an action for a declaratory judgment and for review under Section 10 of the Administrative Procedure Act. Looking to the provision of Section 19(a) of the 1917 Act that "In every case

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where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final," this Court concluded that Congress had cut off judicial intervention in deportation cases except in the habeas corpus proceedings made available by the Constitution. Accordingly, it was held that deportation orders fell within the introductory exception of Section 10 of the Administrative Procedure Act, i.e., "Except so far as (1) statutes preclude judicial review," with the result that such orders continued to be challengeable in the courts only in habeas corpus proceedings, notwithstanding the Declaratory Judgment and Administrative Procedure Acts.

Reviewing the history of the statutory provision that in deportation cases the decision of the Attorney General shall be "final", this Court noted (345 U.S. at 233-235):

> That the Attorney General's decisions are "final" does not settle the question. The appellant properly emphasizes the ambiguity in that term. Read alone, it might refer to the doctrine requiring exhaustion of administrative remedies before judicial process can be invoked. But "final," as used in immigration legislation, has a history, both in the statutes and in the decisions of this Court. It begins with § 8 of the Immigration Act of 1891, 26 Stat. 1085, which provided in part that "All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be

final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury." * * * With changes unimportant here, this finality provision was carried forward in later immigration legislation. See, *e.g.*, § 25 of the 1903 Act, 32 Stat. 1220, and § 25 of the 1907 Act, 34 Stat. 906. During these years, the cases continued to recognize that Congress had intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution. * * *

Read against this background of a quarter of a century of consistent judicial interpretation, § 19 of the 1917 Immigration Act, 39 Stat. 889, clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution. And the decisions have continued to regard this point as settled. *Kessler* v. *Strecker,* 307 U. S. 22, 34 (1939); *Bridges* v. *Wixon,* 326 U. S. 135, 149, 166, 167 (1945); *Estep* v. *United States,* 327 U. S. 114, 122, 123, n. 14 (1946); *Sunal* v. *Large,* 332 U. S. 174, 177, n. 3 (1947). Clearer evidence that for present purposes the Immigration Act of 1917 is a statute precluding judicial review would be hard to imagine. * * *

The reenactment, practically verbatim, in Section 242(b) of the 1952 Act of the "final" clause of the 1917 Act which was before this Court in *Heikkila* compels the conclusion that under the new Act deportation orders continue to be challengeable in the courts only in habeas corpus, and may not be

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reviewed in actions under the Declaratory Judgment and Administrative Procedure Act.[1] This conclusion does not rest solely upon the reenactment of the finality clause. In modern times, Congress ordinarily makes detailed arrangements (in such respects as timing and venue) for direct judicial review where such is contemplated. See Davis, *Administrative Law* (1951), pp. 724-729. The failure of Congress to make such provision in the comprehensive revision of the immigration laws in 1952 is strong confirmation that it did not contemplate judicial intervention in deportation cases except in habeas corpus proceedings in accordance with well-established rules.

B. *The legislative history of the 1952 Act confirms that Congress was unwilling to make deportation orders reviewable by the courts in proceedings other than habeas corpus.*

Despite the reenactment in the 1952 Act of the finality clause of the 1917 Act which was decisive in *Heikkila* v. *Barber, supra,* the court below concluded from the legislative history of the 1952 Act that Congress intended to subject deportation orders to direct judicial review, as, in this case and in *Heikkila,* in an action under the Declaratory Judgment and Administrative Procedure Acts. We

---

[1] The district courts generally have considered the rationale of *Heikkila* v. *Barber, supra,* applicable under the 1952 Act. *Mirabel* v. *Glover* (D.C. P.R., Civ. No. 8445), June 18, 1953; *Ng Wong Dung* v. *Brownell* (S.D. N.Y., Civ. No. 84-356), June 10, 1953; *Sursos* v. *Zimmerman* (E.D. Pa., Civ. No. 14913), March 31, 1953; *Hyun* v. *London* (S.D. Cal., No. 15693-T), July 17, 1953.

submit, to the contrary, that this history shows that Congress was unwilling to make such a change in the existing law, as evidenced particularly by its rejection of amendments which would have accomplished the result of the decision below.

The heavy reliance of the court below upon statements made on the floor of the Senate and the House in the course of a long and bitter debate upon a comprehensive revision of the immigration and naturalization laws, requires careful examination of the context in which they were made, together with appropriate emphasis upon what Congress *did* in contrast to what was said.

The Senate Reports. The Immigration and Nationality Act of 1952 was preceded by extensive Congressional studies of the pre-existing laws and their operation. The results of these studies are contained in S. Rep. 1515, 81st Cong., 2d Sess., dated April 20, 1950, a report of the Senate Committee on the Judiciary entitled *The Immigration and Naturalization Systems of the United States.* This report appears to constitute the Congressional understanding of the prior law upon which the 1952 Act was predicated. The report contains the following statement (p. 629):

> *Judicial review*
>
> Once the order and warrant of deportation are issued, the administrative process is complete. Under the fifth amendment to the Constitution, the "due process" provision, the alien may, however, petition for a writ of habeas corpus. In a habeas corpus proceeding,

> based on a deportation case, the court determines whether or not there has been a fair hearing, whether or not the law has been interpreted correctly, and whether or not there is substantial evidence to support the order of deportation. *Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service.* The dismissal of an application for a writ of habeas corpus is not a bar to the filing of another application before another judge. [Emphasis supplied.]

It is significant that the quoted statement, made in 1950, anticipates this Court's decision in *Heikkila* v. *Barber, supra,* and ignores the prior decisions of the Courts of Appeals for the Third and District of Columbia Circuits, rendered in 1948 and 1949 respectively, holding that Section 10 of the Administrative Procedure Act had made deportation orders reviewable in proceedings other than habeas corpus. *United States ex rel. Trinler* v. *Carusi,* 166 F. 2d 457 (C.A. 3); *Kristensen* v. *McGrath,* 179 F. 2d 796 (C.A. D.C.).

On the same day that S. Rep. 1515 was issued, Senator McCarran introduced S. 3455 (81st Cong., 2d Sess.), the precursor of the 1952 Act. Section 106 of S. 3455 provided that determinations of fact and exercises of discretion by administrative officers "shall not be subject to review by any court," and that determinations of law by administrative officers "shall not be subject to review by any court

except through the writ of habeas corpus." This Section 106 also appeared in the successor bills, S. 716 and H.R. 2379, which were introduced in the First Session of the 82d Congress. These provisions would have restricted drastically the area of judicial intervention in deportation cases. Cf. *Bridges* v. *Wixon*, 326 U.S. 135, and *Carlson* v. *Landon*, 342 U. S. 524.

During the Joint Hearings before the Subcommittees of the Senate and House Committees on the Judiciary on S. 716 and H. R. 2379, in March and April 1951, this novel and restrictive effect of Section 106 was called to the attention of the subcommittees, particularly by Mr. Ennis representing the American Civil Liberties Union and by Mr. Wasserman representing the American Bar Association, who pointed out that it would cut off the review of findings of fact which otherwise would be available in habeas corpus for both exclusion and deportation cases. Hearings, pp. 136-138, 526-530.

Apparently as a result of such objections, when the successor bills, S. 2550 and H.R. 5678, were introduced in the Second Session of the 82d Congress, Section 106 was omitted. The only explanation of the omission is contained in the report of the Senate Committee on the Judiciary (S. Rep. 1137, 82d Cong., 2d Sess.) accompanying S. 2550 which states (p. 28) that:

> In both S. 3455 and S. 716, the predecessor bills, it was provided that administrative determinations of fact and the exercise of administrative discretion should not be subject

> to judicial review and that the determinations of law should be subject to judicial review only through the writ of habeas corpus. This language is omitted from the instant bill. *The omission of the language is not intended* to grant any review of determinations made by consular officers, nor *to expand judicial review in immigration cases beyond that under existing law.* [Emphasis supplied.]

The quoted language, read in the light of the objections raised at the hearings, makes it clear that the deletion of Section 106 represented abandonment of the idea of *greatly restricting* the area of review which had theretofore prevailed in habeas corpus proceedings in deportation cases, and to leave the review of deportation cases to that which prevailed *"under existing law."*

The court below, however, assumed that the phrase "existing law" as used in S. Rep. 1137, which was issued in January, 1952, "at that date included the Administrative Procedure Act as it had been interpreted in 1948, 1949, and 1950 by the *Trinler, Kristensen and Prince*[2] decisions" (R. 22, fn. 16). S. Rep. 1137 itself indicates no such adoption of the views of the Courts of Appeals which were overruled by this Court in *Heikkila* v. *Barber, supra.* More important, conjecture is precluded by the fact, noted above, that the significant and comprehensive S. Rep. 1515 was issued in April 1950, *after* the *Trinler* and *Kristensen* decisions by the Courts of Appeals, and embodies the express

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[2] *Prince* v. *Commissioner*, 185 F. 2d 578 (C.A. 6).

understanding of the Senate Judiciary Committee that "Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service" (*supra*, pp. 19-20). This statement reflects either ignorance or rejection of the view expressed in the *Trinler* and *Kristensen* cases. In either event, it completely refutes the speculation of the court below that by referring to "existing law" in S. Rep. 1137, which accompanied S. 2550, the Senate Committee was referring to the holding in those cases.

Thus, as S. 2550 and H.R. 5678 came to the floors of the Senate and the House, both provided in Section 242(b) that in deportation cases the Attorney General's decision should be final (and, in Section 236(c), that in exclusion cases "the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General").

The House Debate. The first debate took place in the House on H.R. 5678. There, Representative Meader introduced an amendment which would have deleted the provision of Section 242(b) of the bill that the Attorney General's decision in deportation cases shall be "final", and provided instead that "the order of deportation shall be subject to review by any court of competent jurisdiction." (98 Cong. Rec. 4415.) Representative Meader stated that "the most serious part, it seems to me, is the provision that the Attorney General's decision shall be final. I think it is about time we restored the right of individuals to have their cases

heard in a court. * * * If that language does not deny access to the courts, then it seems to me it does not belong in this act" (*Ibid.* 4415). However, Representative Walter, in charge of the bill, opposed the amendment and flatly contradicted Representative Meader's relation of the "final" clause to judicial review, stating (*ibid.* 4416):

> Now, we come to this question of the finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned, but it is not final in that it is not the last remedy that the alien has. Section 10 of the Administrative Procedures Act is applicable. From that decision an appeal lies in the courts. If there is not a final administrative decision, then these aliens will go from one administrative body to another, seeking relief, because they do not want a final adjudication.
>
> * * * In view of the fact that every person who is ordered deported has all of these administrative processes available, plus an appeal to the court, plus the right to a writ of habeas corpus, I cannot conceive of a case where any injustice would be done by some capricious or arbitrary administrator.
>
> I would like to remind the gentleman of one thing, that Senator McCarran, who sat in these hearings, and in the preparation of this bill, and I, were both commended by the American Bar Association because of the work we did in providing for judicial review from a decision of an administrative agency. We

> have been very zealous to see that the philosophy underlying that act is embodied in this measure. I am sure that if the gentleman will look at page 163, paragraph 46, he will find that the law as it was before the House adopted this amendment to an appropriation bill, has been reinstated and that the decision of the Supreme Court in the Sung case will be the law of the land when this code is adopted.

The Meader amendment was defeated (98 Cong. Rec. 4416).

Representative Walter's statement in opposition to the Meader amendment is the only precise statement in the Congressional debates that Section 10 of the Administrative Procedure Act is made applicable to deportation cases—so as to subject deportation orders to review in proceedings other than habeas corpus. His statement was relied upon heavily by the court below (R. 22). However, the significance of Representative Walter's statement is lessened by the fact that it was based upon a serious misunderstanding as to the operation of the bill. His initial statement that the provision that in deportation cases the Attorney General's decision shall be "final" refers only to finality of administrative action, flies in the face of "a quarter of a century of consistent judicial interpretation" to which this Court gave decisive weight in *Heikkila* v. *Barber, supra.*

More important, Representative Walter based his conclusion upon page 163, paragraph 46 of H. R. 5678 (Section 403(a)(47) of the Act) which

repealed the paragraph of the Supplemental Appropriation Act, 1951 (64 Stat. 1044, 1048) which, to undo the result of this Court's decision in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, provided that "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act." In other words, Representative Walter was arguing that what is now Section 403(*a*)(47) of the Act, by repealing the quoted provision of the Supplemental Appropriation Act, 1951, made Section 10 of the Administrative Procedure Act applicable to deportation orders. However Sections 5, 7 and 8 of the Administrative Procedure Act, which were enumerated in the Supplemental Appropriation Act, deal only with the conduct of administrative hearings and have nothing to do with judicial review of deportation orders, and the repeal of that provision could have no effect upon the reviewability of deportation orders.

Since Representative Walter's position that the Meader amendment was surplusage appears from his own statement to be based upon a serious misunderstanding [3] of the operation of the bill, we sub-

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[3] This misunderstanding was repeated on the same day in the House when Representative Meader offered an unsuccessful amendment to subject to judicial review the Attorney General's exercise of the detention powers conferred by Section 242(a). In opposing this amendment, Representative Walter again stated (98 Cong. Rec. 4414) that:

> I would like to call the attention of the gentleman to the fact that on page 163 of the bill, paragraph 46, you will find that what the gentleman seeks to accomplish has been written into the law and the decision of the Supreme Court

mit that his statements are entitled to little weight in determining whether under the 1952 Act deportation orders may be reviewed by the courts otherwise than in habeas corpus proceedings.

The Senate debates. In the Senate, as in the House, discussion of the judicial review of deportation orders centered around proposed amendments which would have accomplished the result of the decision below. The Senate rejected three amendments which were probably intended to make forms of action in addition to habeas corpus available for the review of exclusion and deportation orders. The first amendment, which was in the nature of a substitute offered by Senator Lehman for himself and others, provided, *inter alia,* for the establishment of the Board of Immigration Appeals as an independent agency within the Department of Justice. Section 8 of the substitute provided that, "The provisions of the Administrative Procedure Act shall be applicable to all proceedings relating to the exclusion or expulsion of aliens" (98 Cong. Rec. 5427-5428).

Senator Moody proposed a new Section 105(a), under which the Board of Immigration Appeals would have been vested with authority to review "any decision of the Attorney General * * * in proceedings relating to exclusion [or] deportation

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of the United States in the case of United States versus Sung has been reinstated. The rider that was attached to the deficiency appropriation bill has been set aside through the repeal of that particular section. So the judicial review is provided in all of these cases, and the gentleman's amendment is surplusage.

* * *." The Moody amendment concluded with the sentence "Except in the case of proceedings under section 235(c) [relating to security cases], the provisions of the Administrative Procedure Act shall apply to all proceedings of the Board" (98 Cong. Rec. 5778).

Senator Morse offered an amendment to Section 242(b) designed (1) to make the hearing provisions of the Administrative Procedure Act applicable to deportation and exclusion proceedings, and (2) to provide specifically that "Notwithstanding any provisions to the contrary, * * * every person aggrieved by an adverse order in exclusion or deportation proceedings may obtain court review in an action for declaratory judgment pursuant to title 28, United States Code, section 2201, or upon a writ of habeas corpus." (98 Cong. Rec. 5781.)

Senator McCarran opposed the Morse amendment, particularly on the ground that it would grant a right of judicial review with respect to *exclusion* orders, a right which, he asserted, had never previously been recognized under international law (98 Cong. Rec. 5789). He opposed the Moody amendment on the grounds (1), that it would create an administrative body, within the Justice Department, which could set aside decisions of the Attorney General, the highest officer of the Department, and (2) that it would be unwise to establish the Board of Immigration Appeals as a statutory body, in view of the provisions of S. 14, previously introduced by the Senator, to create an

administrative court to review all administrative determinations (98 Cong. Rec. 5778). Incident to the Moody amendment, Senator McCarran stated (98 Cong. Rec. 5778): "The Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails now. The Senator need not worry about its not being in the law, because the Administrative Procedure Act covers the very point which the Senator is attempting to reach." Senator McCarran's statement, read in context, probably related to the *administrative* review provisions of the Moody amendment (see *supra*, pp. 27-28). Senator McCarran similarly objected to the "sweeping provision [in the Lehman substitute] that the provisions of the Administrative Procedure Act shall be applicable to all proceedings relating to the exclusion or expulsion of aliens." Among other reasons, he opposed the Lehman substitute because of the pendency of S. 14, stating in this connection that "the question of the review of decisions of the Immigration and Naturalization Service had better not be the subject of impulsive tampering at this time" (98 Cong. Rec. 5625). The Lehman, Moody and Morse amendments were defeated (98 Cong. Rec. 5630).

It is clear that Senator McCarran was unwilling to permit non-habeas corpus review with respect to exclusion orders, and he and Senator Ferguson, another member of the committee from which the bill was reported, otherwise indicated that habeas corpus was the proper remedy for the review of

both exclusion *and deportation* orders, in the following colloquy (98 Cong. Rec. 5779):

> Mr. FERGUSON: I wish to inquire whether it would be possible to obtain an appeal through a writ of habeas corpus, in connection with which the application of the rule of substantial evidence would be determined.
>
> Mr. MCCARRAN: That is correct, and it is done right along.

The net result of the Congressional debates on the 1952 legislation was that both House and Senate rejected amendments which would have accomplished the result for which respondent now contends. While one may conjecture as to the action the House might have taken on the Meader amendment absent Representative Walter's statements, such speculation does not begin to constitute the clear evidence of Congressional purpose which should be required to subject deportation orders to direct judicial review—in the face of Congress' reiterated command that in such cases the Attorney General's decision shall be "final". The Senate's rejection of the Lehman, Moody and Morse amendments reflects, at the minimum, unwillingness to make deportation orders reviewable otherwise than in habeas corpus without detailed study of the review problem and, in particular, without distinguishing the review of deportation orders from the review of exclusion orders. The controlling significance of what Congress *did*, in contrast to general observations, is underlined in *United States* v.

South Buffalo R. Co., 333 U. S. 771, in which this Court stated that

> The considerations which led to the suggestion that the problem presented by the Government's position would require separate legislation and particular consideration seems to us to require that the problem be left to legislation rather than to the judicial process. And the pertinent portions of the legislative history which are set out at length in the margin indicate clearly, we think, that this Senate Committee responsible for S. 2009, which became the Transportation Act of 1940, deliberately refused to recommend and the Congress refused to legislate into the law the change we are now asked to make by judicial decision [pp. 778-780].

Here, too, the respondent should address his argument to Congress.

The House and Conference Reports. Against this background, we believe that the decision below finds no support in the general terms of the Conference Report, H. Rep. 2096, 82d Cong., 2d Sess., which states briefly that (p. 127):

> Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework of the pattern of the Administrative Procedure Act. The safeguard of judicial

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procedure is afforded the alien in both exclusion and deportation proceedings.

The first sentence recites only that consideration has been given to problems of judicial review under the bill—problems of whether and what review should be provided for consular decisions on visa applications and for claims of citizenship—as well as for exclusion and deportation decisions. The second sentence can mean no more than that the special administrative procedures provided in Sections 236 and 242 for exclusion and deportation cases were designed to afford aliens the protection of precisely defined procedures and procedural rights. That such general terms throw no light on specific problems of judicial review is demonstrated in the report of the House Committee on the Judiciary (H. Rep. 1365, 82d Cong., 2d Sess., p. 28), which simply states that the bill "Safeguards judicial review and provides for fair administrative practice and procedure (secs. 235, 242, and 360)." The provisions in the enumerated sections for judicial action relate to judicial enforcement of administrative subpenas (Section 235), a limited review of detention decisions in habeas corpus proceedings (Section 242), and judicial determination of certain claims of American citizenship (Section 360). Thus, it is clear that general references to judicial review under the Act may relate to any one of several different matters, and, absent a specific context, are of no assistance in the interpretation of a particular provision of the Act.

As noted above, the fact that in Section 242(b)

of the 1952 Act Congress again provided that the Attorney General's decision in deportation cases should be "final", is alone enough, in view of the history of such finality provisions, to preclude judicial examination of deportation orders except in habeas corpus proceedings. This conclusion finds authoritative support in S. Rep. 1137 which left the review of deportation orders to "existing law," which was carefully defined in the foundation S. Rep. 1515 as precluding judicial review except in habeas corpus proceedings. Thereafter, the problem was specifically discussed only in the course of rejecting repeated amendments which would have changed this established rule. Nothing else which was said in committee reports or debate was specific enough to justify ignoring the specific language of the Act itself and what Congress *did* in rejecting amendments which would have achieved the result which respondent urges. Accordingly, we submit that the rationale of *Heikkila* v. *Barber, supra,* controls, and that, therefore, deportation orders issued under the 1952 Act may be challenged in the courts only in habeas corpus proceedings.

Other provisions of the 1952 Act. While it was entirely proper for the court below to look to other provisions of the 1952 Act in determining what consequences attach to the provision of Section 242(b) that in deportation cases the Attorney General's decision shall be "final" we contend that it drew erroneous conclusions from Sections 242 and 360.

Thus, the court below placed great reliance (R. 19-21) upon the provision of Section 242(c) that

"the Attorney General shall have a period of six months from the date of such [deportation] order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States * * *."[4] Referring to this Court's distinction in *Heikkila* v. *Barber, supra,* between habeas corpus and "judicial review as that term is used in the Administrative Procedure Act" (345 U. S. at 236), the court below stated that " 'Judicial review' is not synonomous with habeas corpus," and concluded that by this oblique reference to "judicial review" in Section 242(c) Congress intended to make deportation orders reviewable otherwise than in habeas corpus (R. 19). To the contrary, we believe that it is clear on the face of Section 242(c) and (e) that these incidental references to "judicial review" merely reflect the understanding of Congress that the actual deportation of an alien is sometimes deferred while federal courts examine deportation orders *in habeas corpus proceedings,* and were made solely for the purpose of insuring that the authorized detention period shall not end until six months after the Attorney General becomes free to effect the alien's removal.

Moreover, there is no basis for the lower court's assumption that in thus alluding to "judicial review" Congress was drawing a precise technical distinction between habeas corpus and "judicial review," or for the repeated supporting assump-

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[4] A similar reference to "judicial review" appears in Section 242(e).

tion that Congress was aware of, accepted, and wrote into the Act the result of the *Trinler, Prince* and *Kristensen* decisions of the Third and Sixth Circuits and of the court below (R. 20). Both assumptions are completely contrary to the expressed views of the Senate Judiciary Committee (*supra*, pp. 19-20), in S. Rep. 1515, *The Immigration and Naturalization Systems of the United States* (p. 629) that:

> * * * In a habeas corpus proceeding, based on a deportation case, the court determines whether or not there has been a fair hearing, whether or not the law has been interpreted correctly, and whether or not there is substantial evidence to support the order of deportation. *Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service.* * * * [Emphasis supplied.]

In view of this precise understanding of the Senate Committee that habeas corpus was the sole method by which deportation orders can be challenged in the courts, plus the express refusal of Congress to provide additional methods of review, it cannot be contended that the incidental allusions to "judicial review" in Section 242(c) and (e) refer to anything other than review in habeas corpus proceedings.

The quoted language of the definitive S. Rep. 1515 likewise reveals, contrary to the assumption of the court below (R. 19), that the Senate Judiciary

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Committee understood that the Attorney General's findings must be supported by substantial evidence even in habeas corpus proceedings, thus indicating that by providing in Section 242(b)(4) that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence" the Committee did not anticipate or intend that this language would make any changes in the manner or in the timing of review of deportation orders.

As a matter of fact, the only fair conclusion that can be drawn from Section 242 as a whole is that the sole method of review contemplated by that section is in habeas corpus proceedings. In subdivision (a) provision is made for detention or release of the alien "pending a determination of deportability." Subdivision (b) provides for the administrative procedure to be followed in determining deportability. And then subdivision (c) provides that

> When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond [etc.].

The court below, while recognizing that in Section 242(a) and (c) Congress intended to provide au-

thority for the continuous detention of an alien from the commencement of deportation proceedings and until the Attorney General has six months in which to effect his deportation, saw a possible gap in this authority. It found this gap in the period in which an alien is challenging the order for his deportation in the courts, on the theory that "if judicial review is had" paragraph (c) authorizes detention of the alien only during the period of six months following the completion of the judicial proceedings. The court below closed this asserted gap by reading the detention provision of paragraph (a), notwithstanding its express limitation to "pending a determination of deportability" as applying during the period of "judicial review" (R. 23). However, it should be noted that there is no "gap" if the reference to "judicial review" in paragraph (c) is read to mean review in habeas corpus. Since the alien may commence habeas corpus proceedings only after he has been taken into custody under a final order of deportation, there was no need to provide in Section 242(c) an express grant of authority to take the alien into custody during the pendency of the judicial proceedings. The mere fact that such an apparent break in the authority to detain is created by the decision below, strongly suggests that the Act contemplates that deportation orders will be challenged only in habeas corpus proceedings, in which event no such gap exists.

Finally, the court below sought textual support for its conclusions in the provision of Section 360

(c) of the 1952 Act that "A final determination by the Attorney General that any *such* person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise" (emphasis added). The court below concluded from this language that Congress had expressly limited persons seeking admission to the United States to review in habeas corpus, and that its failure to impose such a restriction in deportation cases reflected a purpose to make deportation orders reviewable in proceedings other than habeas corpus (R. 20-21). In fact, this provision had an entirely different purpose and history. Under Section 503 of the Nationality Act of 1940, 54 Stat. 1171, persons claiming to be citizens or nationals of the United States, regardless of whether such persons were within or outside the United States, were given a special declaratory judgment procedure to obtain a judicial determination of their claims. The purpose of Section 360 of the 1952 Act is to make that judicial procedure unavailable to persons outside the United States and to provide for the determination of the claims of limited groups of such persons by the Attorney General in administrative exclusion proceedings. In providing that such determinations of the Attorney General "shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise", Section 360(c) is obviously intended to emphasize and make clear the withdrawal of the right to an independent judicial de-

termination. It has nothing to do with ordinary exclusion cases as to which Section 236(c) provides, like the former exclusion statute which was before this Court in *Tom We Shung* v. *Brownell,* decided per curiam December 7, 1953, that the administrative decision shall be final. In brief, the court below drew an entirely erroneous conclusion from Section 360(c).

Practical considerations.

In the Government's brief in *Martinez* v. *Neely,* affirmed by an evenly divided Court, 344 U. S. 916, we pointed out that only legislation could provide for judicial review of deportation orders as soon as they are administratively final, and at the same time prescribe orderly venue arrangements and minimize the possibilities for repetitious review. The Department of Justice has prepared a proposed bill to accomplish these objectives and is seeking the suggestions of appropriate bar groups.

The decision below raises a particularly serious problem in that it suggests, what we do not concede, that orders of the Attorney General excluding aliens from the United States, as well as deportation orders, could be challenged in the courts in proceedings other than habeas corpus. As this Court apparently held in *Tom We Shung* v. *Brownell, supra,* the rationale of *Heikkila* v. *Barber, supra,* compelled the conclusion that under the provision for finality in exclusion cases in Section 17 of the Immigration Act of 1917 (8 U. S. C. 153), Federal courts lacked jurisdiction to examine ex-

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clusion orders except in habeas corpus proceedings. Section 236(c) of the 1952 Act provides, in language taken substantially verbatim from the 1917 Act, that "where an alien is excluded from admission into the United States, under this Act or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General." In *Tom We Shung,* this Court apparently found no distinction between the provisions for finality in the deportation and exclusion provisions of the 1917 Act. The same finality provisions were reenacted practically verbatim in Sections 236(c) and 242(b) of the 1952 Act. Obviously, it could be argued that they have and were intended to have the same consequences as to the availability of judicial review.

As we have pointed out above (*supra,* pp. 28-30), It was made clear in the 1952 debates that Congress, particularly the Senate, was unwilling to subject exclusion orders to challenge in the courts except in habeas corpus proceedings. Thus, unless the decision below is reversed, it might accomplish with respect to exclusion orders what Congress specifically was unwilling to do. Only Congress, by legislation, can provide for the review of deportation orders in declaratory judgment actions, for example, while leaving exclusion orders reviewable only in habeas corpus as it apparently desires to do.

We submit, therefore, that the court below erred in the holding that the district court had jurisdic-

tion to review the order for respondent's deportation in an action under the Declaratory Judgment and Administrative Procedure Acts and in directing, upon the basis of that holding, that the Attorney General be restrained from taking respondent into custody.

II

The Attorney General's Exercise of the Discretionary Authority Vested in Him by Section 242 to Detain an Alien Who Has Been Ordered Deported May Not Be Controlled by Enjoining Him from Taking the Alien into Custody at All.

Even if it is held, contrary to our argument under Part I, that under the 1952 Act the order for respondent's deportation can be challenged in an action under the Declaratory Judgment and Administrative Procedure Acts, we submit that under Section 242 the court below was without power to direct the issuance of a preliminary injunction restraining the Attorney General from "revoking [respondent's] bail and from taking him into custody on a warrant of arrest for deportation, pending final determination of this suit, unless the [Attorney General] shows to the court that there are adequate reasons for making the arrest" (R. 28).

In 1949, at the beginning of the administrative deportation proceedings, the Immigration and Naturalization Service released respondent under a bond for $1,000. On December 29, 1952, the date of the Attorney General's final decision that respondent should be deported, the Commissioner of Immigration signed a warrant of deportation which

directed that respondent be taken into custody and deported, and on December 30, Maryland Casualty Company, the surety on the bond, was directed to surrender respondent for deportation.

Section 242(a) provides in pertinent part:

> * * * Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. *Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.* [Emphasis supplied.]

Section 242(c) provides:

> When a final order of deportation under administrative processes is made against any

> alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, *at the Attorney General's discretion, the alien may be detained,* released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. *Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances* in the case of any alien *to effect such alien's departure from the United States within such six-month period.* * * * [Emphasis supplied.]

We submit that the quoted language, read in the setting of immigration law and practice in which it was enacted, precluded the courts below from restraining the Attorney General in advance from revoking the respondent's bail and taking him into custody, and means that if the Attorney General decides to detain an alien who has been ordered deported such action can be reviewed only after he has acted and then only in habeas corpus proceedings.

At the outset, we call attention to the view of the

court below that the detention of an alien who has been ordered deported after administrative proceedings is governed by paragraph (a) of Section 242, and not by paragraph (c). The court below, looking to the reference in Section 242(c) to a period of six months "from the date of the final order of the court" "if judicial review is had," concluded that that subsection provides no authority for the detention of an alien during the period in which he is challenging the order for his deportation in the courts. However, the court below further decided that detention of the alien during such period was authorized by Section 242(a) because "Congress can hardly have meant to give the Attorney General no authority to arrest the alien, in any circumstances, during the present interval between the final administrative deportation order and the final order of the court" (R. 23). We agree with the reasoning of the court below that Congress, which, in Section 242(a), gave discretionary power to the Attorney General to detain aliens during administrative proceedings to determine whether they should be deported, could not have intended to deny him such power with respect to aliens who had been ordered deported, even during judicial review. Regardless of whether paragraph (a) or paragraph (c) of Section 242 controls here, the result should be the same because both paragraphs contain substantially identical detention provisions. While the following argument is couched in terms of the applicability of paragraph (c), it could be based as well upon paragraph (a).

The provision of Section 242(c) that the Attorney General may "detain" or release on bond or other condition indicates on its face that Congress assumed that the alien would be in custody pursuant to the Attorney General's determination before that determination could be revised by the courts.

If the respondent had been already in custody at the time when he commenced this action, it would be clear that he could challenge a determination of the Attorney General to continue him in custody only in habeas corpus proceedings. This follows from the second sentence of Section 242(c) which provides that "Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period *upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and* circumstances in the case of any alien *to effect such alien's departure from the United States within such six-month period.* * * *" We set forth later in this brief our view that under this provision the Attorney General's determinations with respect to detention or release, during the period of judicial proceedings or during the following six months period, may be challenged only for a lack of reasonable dispatch on his part. But regardless of the scope of the judicial power to revise his determinations, it is clear from this portion of

Section 242(c) that Congress intended them to be reviewed only in habeas corpus proceedings.[5] This reading is confirmed by the reports of the Senate and House Committees on the Judiciary which in describing the detention provisions of Section 242(a) and (c) state that such determinations by the Attorney General "shall be subject to judicial review *only* upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with reasonable dispatch * * *" (emphasis supplied). S. Rep. 1137, pp. 29, 31, H. Rep. 1365, pp. 57-58, both 82nd Cong., 2d Sess. The express statements in the Committee reports that the Attorney General's determinations with respect to detention or release may be reviewed "only" or exclusively in habeas corpus proceedings merely confirm the obvious meaning to be drawn from the language of the Act.[6] Since Congress intended such detention determinations to be reviewed only in habeas corpus, it follows that it intended that such determinations should be reviewed only after the alien was actually in custody and not before.

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[5] Since a practically identical provision appears in Section 242(a), the same result would follow if, as the court below thought, that subsection controlled this case.

[6] As S. 2550, 82d Cong., 2d Sess, was reported to the Senate, there was added to the above-quoted portion of Section 242(c) (and to the corresponding provision of Section 242(a)) the phrase ", but not otherwise." No such provision was contained in the House bill, H. R. 5678, 82d Cong., 2d Sess., and in Conference the phrase was deleted from the Senate bill without explanation. Significantly, the House Report used the word "only" with reference to the House bill which did not contain the words "but not otherwise."

The circumstance that the Attorney General had released the respondent on bond prior to ordering him deported affords no basis for ignoring the command of Congress that the Attorney General's determinations with respect to detention or release shall be reviewed only in habeas corpus proceedings. If the respondent can obtain a preliminary injunction restraining the Attorney General from returning him to custody after he has been ordered deported, other aliens who are released on bond and later ordered deported can do likewise, and in fact, a number of aliens have done so in the District Court for the District of Columbia following the decision below. We submit that it is utterly inconsistent with the whole pattern of past and present immigration statutes to hold that the Attorney General must justify in advance, in the argument and affidavits incident to an application for a preliminary injunction, his prospective exercise of the broad discretionary powers with respect to detention and release vested in him by Section 242(c). Certainly, this result cannot be predicated upon the action of Congress in inserting in detention powers carried forward from Section 23 of the Internal Security Act provisions for judicial review of detention actions which were clearly intended to narrow the holding of *Carlson* v. *Landon*, 342 U. S. 524, 540, as to the scope of such review (see *infra*, pp. 49-51).

The inconsistency of the decision below with the statutory pattern is well stated in the dissent of Judge Fahy to the per curiam order of the court

below granting an earlier motion for a restraining order (R. 14):

> As I read the statute, * * *, particularly § 242(c), the Attorney General is authorized at this point in the deportation proceedings, which have progressed to a final administrative order of deportation, to detain appellant, release him on bond in an amount and containing such conditions as the Attorney General may prescribe, or release him on such other conditions as the Attorney General may prescribe. The warrant of deportation under which appellee now seeks to apprehend and detain appellant does not exhaust the discretion reposed by these provisions in the appellee; and if after apprehension that discretion should be illegally exercised, or if appellant should otherwise be illegally detained, relief by writ of habeas corpus would be available to appellant. In these circumstances I would not now intervene by our injunctive process to restrain the Attorney General. Although McGrath v. Kristensen, 340 U. S. 162 (1950), holds that the declaratory judgment procedure, which appellant is pursuing, is available to test the legality of a deportation order, it does not follow that the equitable powers of this court need be exercised to restrain steps which at present, as they seem to me, accord with the statutory plan in deportation cases.

We submit, therefore, that even if the order for petitioner's deportation may be reviewed in this action, Section 242(c) precludes the courts below

from issuing a preliminary injunction restraining the Attorney General from taking respondent into custody.

The error of the court below in ordering that the Attorney General be restrained from taking respondent into custody is emphasized by its stated reason for doing so—that respondents' detention "would be a clear abuse of discretion". We submit that in Section 242(c) Congress clearly intended that the Attorney General's determinations with respect to detention or release should be unreviewable by the courts even in habeas corpus proceedings, except that his determinations may be revised upon a conclusive showing that he is not proceeding with reasonable dispatch to effect the alien's deportation. *A fortiori,* the Attorney General cannot be enjoined from taking an alien into custody without even an allegation that he is not proceeding with reasonable dispatch.

The detention provision of Section 242(c) was derived from Section 23(a) of the Internal Security Act of 1950 (64 Stat. 987, 1010, 8 U. S. C. (Supp. V) 156(a)), which provided that:

> * * * When such an order of deportation has been made against any alien, the Attorney General shall have a period of six months from the date of such order within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on conditional parole, or upon bond in an amount and specifying such conditions for sur-

> render of the alien to the Immigration and Naturalization Service as may be determined by the Attorney General.

In *Carlson* v. *Landon*, 342 U. S. 524, this Court concluded that the words "at the Attorney General's discretion" were used to resolve dispute as to whether release on bond was a right of the alien or a matter of discretion with the Attorney General. The Court also stated (at p. 540) that:

> The Government does not urge that the Attorney General's discretion is not subject to any judicial review, but merely that his discretion can be overturned only on a showing of clear abuse. We proceed on the basis suggested by the Government.

In holding that the Attorney General's determinations as to detention or release of aliens under the 1950 Act were reviewable for "clear abuse," this Court in substance affirmed the view of the Court of Appeals for the Ninth Circuit in the same case, *Carlson* v. *Landon*, 186 F. 2d 183, decided in December 1950.

Significantly, when S. 3455, 81st Cong., 2d Sess., the bill which evolved into the 1952 Act, was introduced in April 1950, Section 242(c) then contained a detention provision substantially identical with that in Section 23(a) of the 1950 Act. The present detention provisions of Section 242(c) first appear in the successor S. 2055, 82d Cong., 1st Sess., introduced in August 1951, following the decision of the Ninth Circuit in *Carlson* v. *Landon*, *supra*, in December 1950.

The detention provisions of Section 242(c) of the 1952 Act differ from the detention provisions of the 1950 Act in the addition of the second sentence of that section which reads as follows:

> * * * Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period.

We have already pointed out, (*supra*, at pp. 45-46) that the quoted sentence has the intended effect of making the Attorney General's decisions with respect to detention or release reviewable only in habeas corpus proceedings. In addition, the quoted language can only mean that such determinations can be revised, even in habeas corpus, only upon "a conclusive showing" that the Attorney General is not proceeding with reasonable dispatch to effect the alien's deportation. The clear and only possible meaning of these words is that Congress desired to make such determinations of the Attorney General otherwise unreviewable by the courts during the stated period.[7]

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[7] The sole exception, where there is delay in effecting the alien's deportation, is an apparent recognition of the possi-

We submit that these express limitations which Congress has placed upon review of the Attorney General's detention determinations cannot be evaded by enjoining him from taking an alien into custody at all. At a minimum, any doubts as to the scope of review which Congress has provided for such determinations should be resolved in habeas corpus proceedings, which Congress has directed, as it undoubtedly may do, shall be the exclusive channel for challenging them.

During the judicial examination of the validity of a deportation order, it may be said that no alien could ever show that the Attorney General was not proceeding with reasonable dispatch to effect his deportation. If it is felt that during such judicial proceedings Congress intended some other test to be applied by the courts in reviewing the propriety of the alien's detention, we think the test should be that applied by Judge Proctor dissenting in the court below (R. 26-27) and by Judge Letts in the District Court (R. 7-10), i.e., whether the underlying action challenging the deportation order presents a "substantial question" creating "a reasonable belief that the plaintiff will prevail upon a final hearing" (R. 27). As stated above, Congress has made clear its purpose that the Attorney General's determination that the detention of an alien is in the public interest shall be unreviewable. We may assume, *arguendo*, that it would not be incon-

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bilities of delay referred to in *United States ex rel. Potash* v. *District Director*, 169 F. 2d 747, 751 (C.A. 2); and see *Carlson* v. *Landon*, 342 U.S. at 546.

sistent with this legislative purpose for a court to review such a determination upon a showing that the deportation order is based upon such shaky grounds that the alien will probably succeed in his challenge.

But the latter situation is not present here. The only substantial attack which respondent has made upon the order for his deportation is that his conviction in 1947 on 4 counts of an indictment for knowingly making false statements, and conspiring to do so, to avoid military service in violation of the Selective Training and Service Act of 1940, did not constitute a conviction of a crime involving moral turpitude within the meaning of the immigration laws. See *United States* v. *Rubinstein*, 166 F. 2d 249 (C. A. 2), certiorari denied, 333 U. S. 868. We submit that this contention, involving only a question of law, is frivolous for the reasons stated by Judge Letts in the District Court (R. 9-10) and by Judge Proctor dissenting in the court below (R. 26-27). Accordingly, there was no basis for restraining the Attorney General from taking respondent into custody pursuant to Section 242(c) of the Act.

CONCLUSION

Regardless of whether the order for respondent's deportation may be reviewed only in habeas corpus proceedings, as we contend, or also in an action under the Declaratory Judgment and Administrative Procedure Acts, as the court below held, the court below erred in directing the District Court

to issue a preliminary injunction restraining the Attorney General from taking respondent into custody. The judgment should be reversed.

Respectfully submitted.

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DECEMBER 1953.

APPENDIX

The Immigration and Nationality Act (Pub. Law 414, 82d Cong. 2d sess.) provides in pertinent part:

> Sec. 242. (a) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding

sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the

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deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of Section 241(a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this Act.

(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney

General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section. The Attorney General is hereby authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section. Where no Federal buildings are available or buildings adapted or suitably located for the purpose are available for rental, the Attorney General is hereby authorized, notwithstanding section 3709 of the Revised Statutes, as amended (41 U.S.C. 5), or section 322 of the Act of June 30, 1932, as amended (40 U.S.C. 278a), to expend,

from the appropriation provided for the administration and enforcement of the immigration laws, such amounts as may be necessary for the acquisition of land and the erection, acquisition, maintenance, operation, remodeling, or repair of buildings, sheds, and office quarters (including living quarters for officers where none are otherwise available), and adjunct facilities, necessary for the detention of aliens. For the purposes of this section an order of deportation heretofore or hereafter entered against an alien in legal detention or confinement, other than under an immigration process, shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto.

Sec. 360. * * *

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State,

who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States.

Section 10 of the Administrative Procedure Act, 60 Stat. 237, 243, 5 U.S.C. 1009, provides in part as follows:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

* * * * *

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applica-

bility of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Section 19(a) of the Immigration Act of 1917, 39 Stat. 874, 889, as amended, 8 U. S. C. 155(a), provided that any alien found subject to deportation "shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 300

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

vs.

SERGE RUBINSTEIN

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals (R. 19-29) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 11, 1953. The petition for a writ of certiorari was filed on August 28, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1253(1).

Questions Presented

1. Whether, in view of the fact that the Court of Appeals remanded the cause for further proceedings in order to "avoid piecemeal appeals", review by the Supreme Court is warranted at this stage.

2. Whether declaratory judgment actions may be filed subsequent to the effective date of the Immigration and Nationality Act of 1952 to review deportation orders.

3. Whether injunctive relief may be granted in such declaratory judgment actions to preserve the *status quo*, to maintain the court's jurisdiction, and to prevent threatened illegal action by the Attorney General in revoking an alien's bond arbitrarily and without cause.

Statutes Involved

The principal statute involved is Section 242(c) of the Immigration and Nationality Act of 1952 (66 Stat. 210; 8 U.S.C.A. 1252-c) which reads in part as follows:

> When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond, in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney Geenral is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period.

Section 11 of the Selective Training and Service Act of 1940 (50 App. U. S. C. 311) provides in part as follows:

Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

Statement

Respondent is a stateless native of Russia who has no right to enter any foreign country and there is no place to deport him. He lawfully entered the United States for permanent residence on April 3, 1938. His deportation

was ordered on December 29, 1952 upon the ground that he was convicted of violation of Section 11 of the Selective Training and Service Act of 1940 (50 App. U. S. C. 311), within five years subsequent to his reentry in 1939 (R. 1-5).

On December 30, 1952, respondent filed this action for declaratory judgment and moved for a preliminary injunction to prevent his deportation and the threatened revocation of administrative bail by the Attorney General (R. 1-5). The deportation order is attacked as null and void in the complaint which alleges that (1) matters outside the record were considered and respondent was denied a fair hearing; (2) the order of deportation failed to specify the place of deportation and no hearing has been granted upon this vital issue; and (3) the respondent was not convicted of a crime involving moral turpitude.

Injunctive relief was sought to restrain the Attorney General from disturbing the *status quo*, arbitrarily revoking the respondent's bail without cause as he threatened to do, and to prevent respondent's incarceration as long as it appeared that there was no place to deport him (R. 5-7) and that he was not endangering the public by being at large—a fact conceded by the Government (R. 17).

No answer or opposing affidavits were submitted by the Government when the matter was before the Court of Appeals. (Petitoner has since filed an answer in the District Court but this does not appear in the present record.) Upon the first appeal of this cause to the Court of Appeals from a denial of a restraining order, a temporary restraining order was entered and the appellate court reversed the District Court's conclusion that *habeas corpus* was the exclusive remedy (R. 8). No attempt was made by the Government at that time to apply for certiorari, although the Court of Appeals specifically found that a declaratory judgment action might be maintained. Upon the second appeal to the Court of Appeals from a denial of injunctive relief,

the Court of Appeals affirmed its previous ruling that jurisdiction existed to entertain a declaratory judgment action. A temporary injunction was granted to restrain the petitioner's arbitrary revocation of respondent's bail. In so doing the Court of Appeals refused to rule upon the several issues raised on the merits, noting that it desired to avoid piecemeal appeals (R. 27).

Argument

1. Since the judgment of the Court of Appeals was not a final judgment, but one remanding the case to the District Court for further proceedings (without ruling upon the various issues raised on the merits—in order to avoid piecemeal appeals), there is no reason for this Court to consider the questions raised by the petition for certiorari at this time. If petitioner is successful in the District Court upon the merits of the case, the other questions presented herein may well become moot. If he is unsuccessful, his right to petition for certiorari at a later time will not be prejudiced by its denial now. *Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82, 91; *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States* (1951 Ed.), Sec. 130, pp. 233-234.

Normally, this Court has granted certiorari to review non-final judgment in an extremely limited class of cases, as where the issue raised is of "peculiar gravity and general importance" (*Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 258); or "to prevent extraordinary inconvenience and embarrassment in the conduct of the cause" (*American Construction Co.* v. *Jacksonville, T. & K. W. Railway Co.*, 148 U. S. 372, 384), or where an important question of subject matter jurisdiction is raised relating to the power of federal courts to exercise authority over persons incarcerated overseas. (*Johnson* v. *Eisentrager*, 339 U. S. 763.)

In this case, the courts below clearly had subject matter jurisdiction to review an order of deportation. The sole question relates to whether it should be in *habeas corpus* or declaratory judgment. Upon the first appeal to the Court of Appeals in January, 1953, the Government did not deem the question of sufficient importance or urgency to apply for certiorari. No greater need exists today. The Court of Appeals properly refused to pass upon all the issues of the case upon the record before it which does not even contain an answer. Piecemeal appeals will be avoided and no prejudice will result to the parties by denying certiorari at this time.

This argument was vigorously and successfully urged by the Government in opposing certiorari in *Machado* v. *McGrath*, 342 U. S. 948 (October Term, 1951, No. 530, pp. 6-7, Government Brief). The Government should not receive any more favored treatment than Machado in applying for a writ of certiorari.

2. Moreover, it is submitted that the Court of Appeals correctly analyzed the legislative history of the 1952 Immigration and Nationality Act and that its conclusion that it permits and authorizes declaratory judgment is amply justified (R. 21-24). No conflicts have developed in any of the Circuits upon this issue and although the Government disagrees with the conclusion, it believes that the result is a desirable one. Accordingly, it has recommended legislation to permit declaratory judgment actions in deportation cases. (Government's Brief, *Martinez* v. *Neely*, p. 46, note 12, October Term, 1952, No. 218.)[1] The Government's legis-

[1] On September 24, 1953, the Attorney General in his report to the Judicial conference of the United States, stated:

> "While the Government has filed a petition for a writ of certiorari in this case *(Rubinstein* v. *Brownell)*, we think the Congress should spell out a method of obtaining judicial review in the district court for any alien against whom a final order of deportation has been issued, whether he is in custody or not."

lative program may well render moot the jurisdictional issue herein. This possibility is added grounds for scrutinizing the necessity of granting review at this time, in advance of final judgment. We submit that the "peculiar gravity and general importance" of the issue herein has not been demonstrated. On the contrary, it affirmatively appears that this case should be governed by the general rule that non-final judgments should not be reviewed by this Court.

3. On the present state of the pleadings, it appears that the jurisdictional issue (Question 1 of the Petition) is the only one that may warrant consideration at the appropriate time. Should this Court, contrary to the views expressed above, grant certiorari, we submit that it should be limited to the jurisdictional issue herein. It is clear that deportation proceedings are civil in nature (*Harisiades* v. *Shaughnessy*, 342 U. S. 580) and that we are not here concerned with enjoining a criminal prosecution as was the case in *Douglas* v. *City of Jeannette*, 319 U. S. 157, 163 (Pet. p. 17). On the unopposed pleadings herein, the Court of Appeals was clearly justified in enjoining an unauthorized revocation of bail. The Court below properly found that respondent would appear when required and that his presence at large would not endanger the national security or the public peace. In fact, such were the admissions of the Government (R. 17, par. 4). Accordingly, it was appropriate for the Court below to find that the revocation of bail, without any basis for such action, was contrary to law and contrary to the principles enunciated by this Court in *Carlson* v. *Landon*, 342 U. S. 524 (R. 25-26). An illegal revocation of bail by the Attorney General in a civil proceeding, and an attempt to enforce an illegal order of deportation may be enjoined even as any other illegal order of a cabinet officer is subject to restraining action by the judiciary. *Work* v. *Louisiana*, 269 U. S. 250, 254. Injunctions to preserve the

status quo pending judicial review are likewise generally accepted and normal procedure. *M. K. T. Railway Co.* v. *Brotherhood of Railway Trainmen*, 188 F. 2d 302 (C. A. 7). This issue therefore was correctly decided below. More important, it is not of such moment that Supreme Court review is warranted. Injunctions to preserve the *status quo* or to restrain cabinet officers present no novel or unusual principle of general application. No conflicts with decisions of this Court or other circuits are involved. Basically, the issue here is whether an injunction is appropriate to enjoin the Attorney General from revoking an alien's bail without cause. We submit that the injunction was properly issued to prevent such illegal action and to maintain the status quo existing at the inception of the litigation. Review on this issue is therefore not warranted.

The pith of the Government's argument on this point is that the 1952 Act in conferring jurisdiction on the courts to decide the merits of the action simultaneously withholds power to grant any interlocutory relief from a threatened or actual arbitrary and unconstitutional arrest and detention for deportation. In the absence of most compelling statutory language, not present here, the Act should not be construed as withholding the ancillary interlocutory powers which are a traditional and inseparable part of jurisdiction to decide the merits of the controversy. Moreover, the Government asserts this position that the respondent must be relegated to the uncertain and limited remedy of Section 242(c) of the Act in this case in which the Government concedes that public interest does not require detention and in which there is no place to which the respondent may be deported if he were in detention. The gist of the Government's position is that the respondent shall be detained indefinitely without any need or reason for such detention being suggested pending futile efforts to find a place of deportation or pending final decision on his efforts to obtain

release under the uncertain remedy provided by Section 242(c). It is submitted that for the court below to grant interlocutory relief in this situation was certainly a proper exercise of its discretion, if not the only proper course to follow, and this Court will not review that exercise of discretion pending determination of this action.

4. The Government in its petition refers to but does not expressly request review of the question whether the Attorney General has arbitrary powers over the detention of aliens. The claim of such arbitrary powers by the Government is not only contrary to the constitutional principles enunciated in *Carlson* v. *Landon*, 342 U. S. 524, but has been specifically rejected in every case in which it has been asserted under the 1952 Immigration and Nationality Act. *U. S. ex rel. Yaris* v. *Esperdy*, 202 F. 2d 109 (C. A. 2, 1953); *U. S. ex rel. Nukk* v. *District Director*, 205 F. 2d 242 (C. A. 2, 1953); *Yanish* v. *Barber*, 91 Law Ed. (Advance) 793, 73 S. Ct. 1105 (May 16, 1953) and *Rubinstein* v. *Brownell*, No. 11,683 (C. A. D. C. 1953). This unusual claim of arbitrary powers, so at variance with our constitutional and democratic concepts, is unworthy of review.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 300

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

v.

SERGE RUBINSTEIN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 300

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

v.

SERGE RUBINSTEIN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the Court of Appeals and the dissenting opinion (R. 17-27) are reported at 206 F. (2d) 449. The record also contains prior orders and opinions of the Court of Appeals (R. 7, 13-14) and a dissenting opinion (R. 14-15) and the opinion of the District Court (R. 7-10).

Jurisdiction

The judgment of the Court of Appeals was entered on June 11, 1953 (R. 27-28). The petition for a writ of certiorari was filed on August 28, 1953, and granted on Novem-

ber 9, 1953 (R. 31). The jurisdiction of this Court is conferred by 28 U. S. C. 1254(1).

Questions Presented

1. Whether a declaratory judgment (28 U. S. C. 2201) or review under the Administrative Procedure Act (5 U. S. C. 1009) is maintainable to challenge an order of deportation in an action filed subsequent to the enactment of the Immigration and Nationality Act of 1952 (8 U. S. C. 1101).

2. Whether *Heikkila* v. *Barber*, 345 U. S. 229 (1953) should be extended and applied to actions instituted subsequent to December 24, 1952, an issue expressly reserved in footnote 4 of the opinion in that case.

3. Whether, as contended by the Government, there may be no judicial review of the *validity* of a deportation order by declaratory judgment, habeas corpus, or otherwise, under 8 U. S. C. 1253(c) unless and until an alien has been in custody in excess of six months.

4. Whether the Attorney General lacks statutory power under 8 U. S. C. 1252(c) to arrest and detain an alien for deportation pending judicial review of the warrant and order of deportation and of the fairness and adequacy of the deportation proceeding.

5. Whether, upon the Attorney General's concession that the respondent is not a security risk while at large on bail pending judicial review of the deportation proceeding, it is a denial of due process of law to arrest and detain respondent for effectuation of deportation pending judicial review.

6. Whether respondent's administrative bail may be cancelled and respondent arrested and detained *for deportation* on a warrant of deportation which does not state a place of deportation and in the absence of a determination by the Attorney General of the existence of an available place of deportation.

7. Whether respondent, on the facts disclosed in his complaint and affidavit in support of his motion for preliminary injunction and in the absence of an answer or any opposing affidavit, had made out a case for a preliminary injunction.

Statement

The complaint, the affidavit in support of the motion for a temporary restraining order and preliminary injunction, and the admission of counsel for petitioner in open court that no injury to the public interest is to be anticipated from postponing respondent's arrest, have not been controverted by any answer,[1] other pleading, affidavit, or in any manner by the petitioner. The uncontroverted facts alleged in the complaint and affidavit are as follows:

The complaint alleges that respondent is a stateless native of Russia who on April 3, 1938 was admitted for permanent residence and has resided continuously in the United States since that time (R. 1). The respondent provides all the living expenses of his two minor citizen children, ages six and seven, and of his citizen mother, over seventy years of age who resides with him, and his citizen aunt, also over seventy years of age (R. 1). In April, 1939, respondent took a six to ten days round trip Caribbean cruise on the SS. Kungsholm from New York City (R. 1). On April 23, 1947 respondent was convicted of violation of § 11 of the Selective Training and Service Act of 1940 (50 U. S. C. App. 311) and was sentenced to imprisonment for two and one half years [*United States* v. *Rubinstein*, 166 F. (2d) 249 (C. A. 2, 1948)]. Thereafter respondent was served with a warrant of arrest in a deportation proceeding and given a deportation hearing on November 5, 1948 (while serving his full sentence in the Federal Penitentiary

[1] Following the decision of the Court below an answer was filed in the District Court which is not a part of the record on this appeal.

at Lewisburg, Pennsylvania) (R. 1-2).[2] The hearing officer who presided at the deportation hearing recommended that the warrant be cancelled and the proceeding terminated upon the ground that the respondent's crime did not involve moral turpitude (R. 2).

The complaint further alleges that the District Director of Immigration and Naturalization at Philadelphia, Pennsylvania, reviewed the proposed order to cancel the proceeding, although not authorized to do so, and filed a memorandum recommending deportation (R. 2). Thereafter, without respondent's request and contrary to his desires, the Commissioner of Immigration and Naturalization directed a hearing *de novo* which was held on October 1, 1951 (after the respondent was liberated from imprisonment).

The complaint further alleges that the presiding official at the second hearing was improperly influenced by the views of his superiors, including the District Director at Philadelphia, recommending deportation (R. 2). The hearing was required to be conducted under oath and the presiding officer administered a purported oath but was not authorized so to do by any federal or state law (R. 2). The presiding officer recommended deportation upon the ground that the crime involved moral turpitude and was committed within five years after entry in to the United States. Upon appeal the Board of Immigration Appeals of the Department of Justice ordered deportation and (pursuant to regulations, 8 C. F. R. 90.7) certified the case to the Attorney General for review of the Board's decision. The Attorney General (petitioner's predecessor) affirmed the Board's decision (R. 2).

---

[2] The conviction was obtained and the deportation proceeding commenced by the Department of Justice under Attorney General Tom C. Clark and concluded under Attorney General James P. McGranery.

The complaint further alleges that in concluding to deport respondent the Attorney General, acting through his agents, considered matters outside the record of hearing available to respondent and his counsel and, upon information and belief, maintains a separate confidential file on respondent which is not available to respondent and his counsel, and received many letters, telegrams and other communications urging respondent's deportation and had his attention directed to newspaper columns urging respondent's deportation (R. 2). The complaint further alleges, upon information and belief, that the deportation order was entered and the case considered by the Attorney General and his subordinates in the light of unfavorable newspaper publicity and confidential information not disclosed to respondent, and that thus respondent was denied the rudimentary requirements of due process and elementary fairness, and the deportation hearing and order were null and void (R. 3).

The complaint further alleges that the respondent is not a citizen of any country and is stateless and has no residence or domicile in any country except the United States and has no passport or other travel documents and has no right to enter any foreign country (R. 3). The order of deportation does not specify the place to which the respondent is to be deported and is vague and null and void, and respondent has not been accorded a hearing as to the place to which he is to be deported, and the petitioner does not intend to grant him such a hearing although requested to do so (R. 3). The complaint prays for judgment that the deportation hearing was unfair, that the deportation order is null and void, that the respondent is not subject to deportation, and for an order restraining petitioner from taking respondent into custody and deporting him (R. 3).

The affidavit in support of the motion for preliminary injunction asserts that if the petitioner is not enjoined the respondent will be taken into custody and deprived of his liberty until the proceeding has been determined and thereby will be deprived of his ability to earn a living and support himself and his dependents and the Court may be deprived of jurisdiction over this declaratory judgment action (R. 5). The affidavit further sets forth, uncontradicted by petitioner, that the respondent has been granted administrative bail during the entire administrative hearing herein, that the best interests of the United States will not be adversely affected by the respondent being at large, that there has been no suggestion that respondent is hostile in any manner to the Government of the United States, or does not adhere to the principles of democracy, or has been engaged, or is engaged, or is likely to engage in any subversive activity or is engaged, or is likely to engage in any criminal or reprehensible activities (R. 5). The affidavit further states, and the petitioner does not deny, that petitioner has authorized continuation of bail for persons similarly situated during judicial review and petitioner's denial of continuation of bail herein constitutes an abuse of discretion and that respondent's detention for any period of time will result in irreparable injury and damage to him and to the business interests of corporations of which he is the president (R. 5).

On December 30, 1952 United States District Judge Pine denied a restraining order (R. 12) and upon appeal therefrom and application to the Court of Appeals for a restraining order pending appeal counsel for petitioner stated to the Court of Appeals "that no injury to the public interest is to be anticipated from postponing the Appellant's (respondent here) arrest" (R. 14). An order of the Court of Appeals of December 31, 1952 granted a restraining order pending appeal (R. 14).

An order of the Court of Appeals of January 5, 1953 remanded the case to the District Court for consideration of the question of detention in accordance with the principles applicable in habeas corpus proceedings and continued the restraining order until further order of the District Court (R. 7). On January 23, 1953 United States District Judge Letts filed an order denying the motion for preliminary injunction (R. 11) and immediately agents of petitioner sought to arrest respondent pending the application to Judge Letts for a stay pending appeal which was denied on January 23, 1953 (R. 12) and the application to the Court of Appeals for a stay pending appeal which was granted by an order of January 26, 1953 (R. 13-14).

The Rulings Below

The District Court denied the preliminary injunction herein upon the following three grounds: (1) That the complaint was not verified, that the supporting affidavit was not made upon personal knowledge and that such affidavit was merely "a restatement of matters set forth in the complaint." (2) That the only issue of substance was whether Rubinstein's crime (for which deportation is here sought) involved moral turpitude and that since all crimes do which are contrary to justice and modesty (as well as crimes merely malum prohibitum), Rubinstein committed a deportable offense when he was convicted of violation of 50 App. U. S. C. 311. (3) That preliminary injunctions should only be granted where there is reasonable certainty that complainant must succeed at final hearing (R. 7-10).

The Court of Appeals reversed the District Court by a divided court (R. 17-27). (1) The majority, tracing the legislative history of the 1952 Immigration and Nationality Act, distinguished *Heikkila* v. *Barber*, *supra*, and held that a deportation order might be tested in the present declaratory judgment action. No dissent was recorded on this

issue (R. 18, 25). (2) It was further held that 8 U. S. C. 1252(c) [Section 242-c of the 1952 Act] did not authorize respondent's arrest because it became operative only after completion of judicial review where litigation had been instituted. (3) The majority of the Court of Appeals accepted the undenied allegations of the complaint and motion and noted that the record shows "no reason for the order of arrest" and held that respondent's arrest under 8 U. S. C. 1252(a) would therefore be an abuse of discretion in the light of *Carlson* v. *Landon*, 342 U. S. 524 (1952). (4) The majority also found that if equities were to be balanced, "the record contains nothing that could outweigh the irreparable loss of personal liberty which would follow" the unjustified and illegal threatened detention of respondent for deportation. (5) Finally, the Court of Appeals ruled that whether respondent was guilty of a crime involving moral turpitude was (R. 24-25):

> "only one of the issues raised by the complaint on which the validity of the deportation order will depend. To avoid piecemeal appeals, we shall not consider this issue until the others have been heard. The case is accordingly remanded to the District Court for further proceedings, with directions to issue a preliminary injunction. . . ."

The dissent believed that there was jurisdiction to issue a preliminary injunction based upon the Court's "general powers to preserve pendente lite its jurisdiction over the case or prevent irreparable injury." It assumes that the Attorney General will not (R. 27) "go forward with deportation pending final determination of judicial review", that the Attorney General desires merely to interview respondent at Ellis Island "to adjust the terms of Rubinstein's release in view of the deportation order" and that therefore injunctive relief is premature. The dissent also con-

cludes that the moral turpitude issue is the sole substantial basis for attacking the deportation order and that it must fail.

Statutes and Regulations

The applicable statutes and regulations are set forth in the appendix to this brief at pages 72 to 76.

Summary of Argument

On December 29, 1952, when the respondent was ordered deported, the adjudicatory process herein came to an end. At that point a justiciable controversy existed between adverse parties with issues ripe for judicial intervention and appropriate for declaratory judgment. Whatever doubts may exist as to the soundness of *Heikkila* v. *Barber*, 345 U. S. 229 (1953) which expressly reserved the issue presented herein, it is clear from the legislative history of the 1952 Immigration Act and its language, as noted by the Court below, that the instant action filed on December 30, 1952 may be maintained under the Declaratory Judgment Act (28 U. S. C. 2201) and under Section 10 of the Administrative Procedure Act (5 U. S. C. 1009).

Both the majority and minority of the Court below found that the action herein was maintainable. The minority opinion concedes that injunctive relief is within the Court's jurisdiction to preserve the *status quo* or to prevent irreparable injury. We submit that the majority opinion correctly concluded upon the undenied allegations of the pleadings that the Attorney General was seeking to take respondent into custody for the purpose of effectuating deportation pursuant to 8 C. F. R. 243.2 (1952) although no place of deportation is available.

Pending judicial review, the *status quo* should not be disturbed. No proper purpose will be served by respond-

ent's detention pending final determination of the instant case upon its merits.

Upon the record herein, the complaint and affidavit in support of respondent's application for an injunction, the following appears: (1) Respondent will not constitute a danger to the public interest if permitted at large. (2) No claim is made that he will not appear when wanted. (3) No denial is made of paragraph 10 of the affidavit filed herein that in similar cases administrative bail is continued pending judicial review (R. 5). (4) The Attorney General is seeking to take respondent into custody pursuant to an incomplete, and therefore void, warrant of deportation which does not state the place of deportation. (5) The Attorney General presently has no place to which he proposes to deport respondent. (6) The Attorney General has not granted respondent a hearing upon his claim that he will be physically persecuted if returned to Russia and according to paragraph 33 of the complaint has no intention of granting him such hearing although required to do so pursuant to 8 U. S. C. 156(a), 1253(b). (7) The allegations of the affidavit submitted in support of the application for relief herein have not been controverted by any opposing affidavit. (8) No answer has been filed to the complaint. (9) Where judicial review is sought, the six-month period of Section 242(c) of the 1952 Act (66 Stat. 210; 8 U. S. C. A. 1252c) begins to run only after the conclusion of such judicial review and therefore that section does not presently empower the Attorney General to detain respondent.

The principles by which the legality of detention herein should be determined are expressed in *Carlson* v. *Landon*, 342 U. S. 524 (1952). These principles are that the due process clause of the Fifth Amendment requires that an alien be granted reasonable bail pending effectuation of

deportation unless he is a danger to public security or about to abscond. The Attorney General concedes that these conditions are not present here. The cases hold that revocation of bail without adequate reasons proved in court by the Government is arbitrary, capricious and unconstitutional.

In addition to a conceded lack of any public security reason for revoking bail, there is the compelling additional reason in this case that it is capricious to detain an alien as incident to deportation when the Attorney General concededly has not found a place to which the alien may be deported and has not named a place of deportation in the warrant of deportation. Detention in such circumstances is arbitrary, unconstitutional and unlawful punitive executive action. Moreover the case presents substantial legal questions on the validity of the order of deportation and the fairness of the administrative hearing.

The Court of Appeals therefore properly found that an injunction should issue because the threatened revocation of bail was arbitrary, and because upon balance, the equities favored maintaining the *status quo*. Its conclusion that the Attorney General had no absolute, capricious or dictatorial powers to detain respondent, as contended by petitioner, was likewise correct. *U. S. ex rel. Yaris* v. *Esperdy*, 202 F. 2d 109 (C. A. 2, 1953); *U. S. ex rel. Nukk* v. *District Director*, 205 F. 2d 242 (C. A. 2, 1953); *Yanish* v. *Barber*, 91 Law Ed. (Advance) 793, 73 S. Ct. 1105 (1953).

Point I

The District Court Has Jurisdiction of This Action

The Government's argument is that the provision of § 242(b) of the 1952 Act that "the decision of the Attorney General shall be final" prohibits this action because similar language of § 19 of the Immigration Act of 1917 has been held to prohibit such an action. *Heikkila* v. *Barber*, 345

U. S. 329. The respondent contends that the whole text and history of the 1917 Act is entirely different from the text, historical background, and legislative history of the 1952 Act in which is disclosed the intent of Congress that this action, as well as *habeas corpus*, shall be available to review deportation orders.

Heikkila v. *Barber*, 345 U. S. 229 (footnote 4) expressly states that "we do not consider the 1952 Act, 66 Stat. 163, which took effect after Heikkila's complaint was filed." Moreover the opinion emphasizes that the historical background of the 1917 Act was the basis of its conclusion that, prior to the 1952 Act, *habeas corpus* was the exclusive remedy for judicial review of a deportation order. The opinion carefully observed:

> "• • • Each statute in question must be examined individually; its purpose and history as well as its text are to be considered in deciding whether the courts were intended to provide relief for those aggrieved by administrative action. Mere failure to provide for judicial intervention is not conclusive; neither is the presence of language which appears to bar it.
>
> That the Attorney General's decisions are 'final' does not settle the question. The appellant properly emphasizes the ambiguity in that term.
>
> • • • • • • •
>
> Read against this background of a quarter of a century of consistent judicial interpretation, Section 19 of the 1917 Immigration Act, 39 Stat. 890, clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution.
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> • • • • • • •
>
> • • • In short, it is the scope of inquiry on habeas corpus that differentiates use of the writ from judicial review as that term is used in the Administrative Procedure Act."

The instant action arises upon a deportation order of December 29, 1952, and a complaint for injunctive and declaratory relief filed December 30, 1952, both subsequent to December 24, 1952, the effective date of the 1952 Act (Sec. 407; 66 Stat. 281). Read against its historical background the 1952 Act is not a statute precluding judicial review and therefore that this action may properly be maintained.

A. This Action Is Not Governed by the 1917 Immigration Act

The present action was instituted on December 30, 1952 (R. 1). The effective date of the 1952 Act was December 24, 1952 (66 Stat. 281). Section 405(a) of the 1952 Act (66 Stat. 280), however, provides that "as to all such prosecutions, suits, actions [pending when the 1952 Act became effective] * * * the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided herein, hereby continued in force and effect". It is clear that Congress intended that judicial proceedings instituted before December 24, 1952, like *Heikkila's* action, should be governed by the repealed immigration laws and that judicial proceedings commenced thereafter, like this action, should be governed by the 1952 Act. Except to the extent of the saving clause, the repeal of the 1917 Act eradicated its effect on the jurisdiction of the federal courts to entertain this action. *Avina* v. *Brownell*, 112 F. Supp. 15 (S. D. Texas 1953); *Vasquez* v. *Brownell*, 113 F. Supp. 722 (W. D. Texas, 1953); *D'Argento* v. *Dulles*, not officially reported, Pike and Fischer, Administrative Law, 2nd, 623 (Dist. of Col., 1953); *In re Yoshida*, 113 F. Supp. 631 (D. Hawaii, 1953). Cf. *Bruner* v. *United States*, 343 U. S. 112 (1952).

Thus Congress directed an orderly transition from the old to the new law. The Government, indeed, agrees with respondent that the 1952 Act governs this action.[3]

B. The 1917 Act and Its Background

At the outset it warrants emphasis that in the *Heikkila* decision this Court was determining the intent of Congress in repeating language in *1917* which had been used in former statutes and already at that time had been construed by this Court as "precluding judicial intervention in deportation cases except insofar as it was required by the Constitution". The question considered in the *Heikkila* case was whether Congress in 1946 in § 10 of the Administrative Procedure Act intended by implication to amend the 1917 Act as interpreted up to that time to provide for "judicial review" of deportation orders in the present type of civil action. On that question this Court determined that Congress did not intend in 1946 to subject such deportation orders to the "scope of review" of § 10(e) namely, substantial evidence on the whole record to support the deportation order, stating "In short, it is the scope of inquiry on *habeas corpus* that differentiates use of the writ from judicial review as that term is used in the Administrative Procedure Act". Therefore this Court treated deportation orders as

[3] The savings clause preserved the process of administrative adjudication under the 1917 Act for cases instituted thereunder. Judicial review however is governed under the new law, unless pending upon the effective date of the 1952 Act and therefore preserved under the savings clause. It could not be maintained that the old law applied exclusively simply because the ground of deportation, which is a ground of deportation under both the old [Sec. 19(a) of the 1917 Act] and the new law [Sec. 241 (a)(4) of the 1952 Act], was originally asserted by the Attorney General against respondent under the old law. Such a contention would render inapplicable to all deportation proceedings pending on December 24, 1952 the numerous procedural provisions of the 1952 Act with respect to execution of deportation orders and control of aliens pending deportation (Secs. 242 and 243 of the 1952 Act) which the Government asserts are applicable to all such cases.

agency action within the first exception of § 10 of the 1946 Act concerning which "statutes preclude judicial review". We adopt the views set forth in petitioner's brief in *Tom We Shung* v. *Brownell* (No. 241, October Term, 1953), with respect to the soundness of the *Heikkila* decision. However, accepting the validity of the *Heikkila* case, *arguendo*, it is submitted that the circumstances surrounding the enactment of the 1952 Act disclose an intent by Congress not to preclude judicial review and not to confine deportation orders to judicial scrutiny solely in *habeas corpus* proceedings.

C. The 1952 Act and Its Background

This Court expressly recognized in the *Heikkila* decision that the ambiguous administrative "finality" clause in a statute does not determine the mode or scope of judicial scrutiny of administrative decision and that the entire text and history of the particular statute must be examined. Congress reenacted the finality clause of the 1917 Act according to *Heikkila* v. *Barber*, *supra*, against the background of consistent judicial interpretation precluding judicial intervention except in *habeas corpus*. But the finality clause of the 1952 Act was enacted against an entirely different background including express recognition of judicial review in the text of the statute and against a background of an opposite judicial construction.

To exclude judicial review under § 10 of the Administrative Procedure Act, the statute excluding such review should make such an intention clear upon its face.[4] Section 12 of the Administrative Procedure Act (5 U. S. C. 1011) requires express statutory language in subsequent legislation to

[4] The House and Senate reports upon the bill which became the Administrative Procedure Act (*House Report 1980*, p. 41 and Senate Document 248, p. 275, 79th Congress, 2d Session) stated: "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it."

secure an exemption from any of its provisions. (See also: *House Report 2140*, 80th Congress, 2nd Session, p. 1). The 1952 Immigration Act contains no such specific exemption, although previous bills introduced in the 80th and 81st Congress relating to this subject, had sought such exemption by express language. The 1952 Act not only does not give clear and convincing evidence of an intent to withhold judicial review under the 1946 Act but on the contrary both the text and legislative history of the 1952 Act makes it clear that such judicial review was recognized and sanctioned.

1. Section 242 of the 1952 Act (8 U. S. C. 1252) which contains the finality clause in subsection (b) also expressly contemplates in subsections (c) and (e) that there shall be "judicial review" of deportation orders and provides for control of the alien during the six months period from the final order of the court "if judicial review is had" and thereafter. The text of this section clearly distinguishes between judicial review of deportation orders, which Congress recognizes must postpone actual deportation, and judicial authority in *habeas corpus* to "review or revise any determination of the Attorney General" concerning detention, parole or release of an alien pending determination of deportability (subsection (a)), or for six months after completion of judicial review of the deportation order (subsection (c)). Thus the text of the 1952 Act, unlike the 1917 Act which has no such provisions recognizing judicial review and qualifying the finalty clause, resolves the ambiguity in the finality clause by expressly recognizing the existence of judicial review.[5]

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[5] The distinction between judicial review of deportation orders and review of detention in habeas corpus is recognized not only by Congress in § 242 but also by this Court. *Heikkila* v. *Barber*, 345 U.S. 329 (1953); *Estep* v. *United States*, 327 U.S. 141 (1946); *Sunal* v. *Large*, 332 332 U.S. 177 (1947); *Bridges* v. *Wixon*, 326 U.S. 135, 167 (1945).

2. Section 242(b), unlike the 1917 Act, further evidences the Congressional intention to permit judicial review of deportation orders by the provision that deportation proceedings shall be conducted in accordance with regulations of the Attorney General which shall include a requirement that "(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence." Thus Congress adopted for deportation hearings substantially the same rule as that provided for agency hearings by § 7(c) of the Administrative Procedure Act which provides that no order shall be issued except "as supported by and in accordance with the reliable, probative and substantial evidence" (5 U. S. C. 1006). It is submitted that the use of this language in § 242(b) strongly implies the intent of Congress to subject deportation orders to ordinary judicial review, not limited to *habeas corpus*, to determine whether they are based upon reasonable, substantial and probative evidence.

In this connection it may be noted that to the extent that Congress did not wish deportation hearings to be governed by the Administrative Procedure Act it made express provision. Section 242(b), between the sentence providing the substantial evidence rule and the sentence providing the finality clause, provides that "the procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."[6] Thus Congress, where it so intended, expressly excluded application of administrative hearing procedure provided by §§ 5,

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[6] This language was adapted from § 242(b) of the first Senate omnibus immigration and nationality bill (S. 3455, 81st Cong., 2nd Sess.), which became § 242(b) of the 1952 Act, expressly providing that "Notwithstanding any other law, including the [Administrative Procedure] Act of June 11, 1936 (60 Stat. 237), the proceedings so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien who is in the United States".

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7 and 8 of the Administrative Procedure Act.[1] The failure similarly to exclude the judicial review procedure of § 10 of the Act strongly implies that this judicial review procedure of deportation orders was not excluded by Congress. It might be suggested that the 1952 Act requirement of substantial evidence, not present in the 1917 Act, is a mere exhortation by Congress to the Attorney General not intended to modify the finality clause and subject the deportation order to the customary judicial review of the question whether the order is supported by reasonable, substantial and probative evidence. This, however, would be a very strained construction of § 242(b) to endow the finality clause with an absolute quality at the expense of the rest of the language in the section. The natural construction is that Congress intended that deportation orders should be subject to the usual judicial review to determine whether they are supported by reasonable, substantial and probative evidence. Any concession that Congress did intend by this statutory provision court review of sufficiency of evidence to support deportation orders but only in *habeas corpus* proceedings would constitute in effect an abandonment of the argument that the finality clause expresses an intent to limit judicial examination to something less than "judicial review" and the substitution of an argument that the finality clause merely expresses the Congressional intent in respect of the mode of review by *habeas corpus* rather than the scope of review. On this question of what did Congress intend by the finality clause, coupled in the 1952 Act with

[1] Prior to the 1952 Act, in order to nullify *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950), holding §§ 5, 7 and 8 of the Administrative Procedure Act applicable in deportation proceedings, the Supplemental Appropriation Act, 1951 (64 Stat. 1044, 1048) expressly made these sections not applicable to "exclusion or expulsion of aliens * * *." Because § 242(b) dealt with this matter directly the provision of the 1951 Act was repealed by the repealer section, § 403(a)(47), of the 1952 Act (66 Stat. 279).

other language implying judicial review, there is no basis for concluding that the finality clause was intended to dictate the procedural mode of judicial examination rather than the scope of judicial review. To the extent that the finality clause in the context of the 1952 Act is anything more than a vestigial carryover from the 1917 Act and expresses an intent of Congress, the intent is that the Attorney General's decision is the final administrative decision subject, however, to the judicial review contemplated by § 242 and other sections of the 1952 Act.

3. In the 1952 Act Congress made express provision when it intended that the Attorney General's final determination could be reviewed by *habeas corpus* and not otherwise. Section 360(c) [8 U. S. C. 1503(c)] expressly withdraws the remedy of declaratory judgment (28 U. S. C. 2201) from persons outside the United States claiming a right or privilege as nationals of the United States. Such persons, provided they have been physically present in the United States or are under sixteen years of age and were born abroad of an American citizen parent, are relegated to the procedure applicable to an alien seeking admission and the Attorney General's final determination that such person is not entitled to admission "shall be subject to review by any court of competent jurisdiction in *habeas corpus* proceedings and not otherwise."[8] The Court below correctly pointed out that "The fact that Congress said clearly what it meant in

[8] The prior law, § 503 of the Nationality Act of 1940, 8 U.S.C. 903, authorized any person, in or out of the United States, claiming a right or privilege as a national of the United States to bring an action in a district court for a judgment declaring him to be a national of the United States. The 1952 Act restricts such actions to persons within the United States and permits only a limited class of persons outside the United States to obtain certificates of identity to apply for admission at a port of entry. No provision is made for any person abroad claiming to be a national of the United States who has not been physically in the United States or who is not a person under sixteen years of age born abroad of a United States citizen parent.

§ 360(c) with regard to admission is strong evidence that it did not mean what it did not say in § 242(c) with regard to deportation" (R. 21). The Government, however, argues (Br. 38) that § 360(c) has nothing to do with ordinary exclusion cases and implies that the Court below said or thought that it did and that therefore reliance on § 360(c) was mistaken. The Court below, however, did not say or imply that § 360(c) applies to *all* persons seeking admission to the United States but merely points out that when Congress intended in the 1952 Act to restrict review of a class of final determinations of the Attorney General to *habeas corpus* it expressly said so.

4. The 1952 Act was enacted against a background of judicial interpretation entirely different from that of the 1917 Act. Three Courts of Appeals ruled between February 16, 1948 and November 17, 1950 that Congress intended to subject deportation orders to review under § 10 of the Administrative Procedure Act of 1946. *U. S. ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (C. A. 3, 1948); *Kristensen* v. *McGrath*, 179 F. 2d 796 (C. A. D. C., 1949), affirmed *McGrath* v. *Kristensen*, 340 U. S. 162 (1950); *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3, 1950); *Prince* v. *Commissioner*, 185 F. 2d 578 (C. A. 6, 1950). Reenactment of the finality clause in the 1917 Act was considered by this Court in the *Heikkila* decision as adoption of the judicial construction placed on the finality clause prior to 1917. Equally, enactment of the finality clause in the 1952 Act should be construed as approval of the unanimous construction that had been placed on the statute by the Courts of Appeals and under which hundreds or possibly thousands of cases had been instituted seeking judicial review of deportation orders under the Declaratory Judgment Act and the Administrative Procedure Act. Under the applicable rule of statutory construction Congress impliedly accepted the

construction of the Courts of Appeals when it reenacted the finality clause in the 1952 Act.

Moreover, the 1952 Act was enacted against the background of a legislative practice which developed in recent years and long after 1917 as part of the expanding field of administrative law and judicial control thereof, under which Congress has not expressed its intention to bar judicial review merely by reference to the finality of administrative decisions but only by explicit language expressly barring judicial review. *Estep* v. *United States*, 327 U. S. 114, 120 (1946); *Reynolds* v. *United States*, 292 U. S. 443 (1934); *United States* v. *Williams*, 278 U. S. 255 (1929). See also Davis, *Administrative Law* (1951), p. 839. See for examples of express prohibition of judicial review where that is the intention of Congress § 601(c) of the Revenue Act of 1936, 49 Stat. 1740, making the Commissioner's determination final with respect to certain special refunds and providing "no court shall have jurisdiction to review such determination"; § 11 of the Act of October 17, 1940, 54 Stat. 1197 (38 U. S. C. 11a-2) providing that "the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits * * * shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision." *Van Horne* v. *Hines*, 122 F. 2d 207 (C. A. D. C., 1941). Another example is § 9 of the Act of March 7, 1941, 55 Stat. 26 [26 U. S. C. 732(c)] providing that certain determinations of the Board of Tax Appeals in respect of the calculation of the excess profits tax shall be final and "shall not be reviewed or redetermined by any court or agency except the Board."

D. Legislative History of the 1952 Act

The qualification of the finality clause in the 1952 Act, disclosed by the text of the statute and the modern legis-

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lative practice of explicitly barring judicial review where that is intended, is also expressly supported by the legislative history of the 1952 Act. Examined chronologically the legislative history discloses that Congress intended review of deportation orders pursuant to § 10 of the Administrative Procedure Act.

1. *The Hobbs bill.* After this Court's decision in *Sung* v. *McGrath*, 339 U. S. 33 (1950), the Immigration Service instituted efforts to secure full exemption from the examiner and review provisions of the Administrative Procedure Act. H. R. 6652, 80th Congress, 2d. Session, sought to relieve the Immigration Service from all provisions except the public information section. The House Judiciary Committee took specific note of the *Trinler* decision, *supra*, in favorably reporting this bill (*House Report 2140*, 80th Congress, 2d. Session, pp. 2, 6). Efforts continued to secure review and hearing examiner exemption with the introduction of the so-called Hobbs Bill in the 81st Congress, 1st Session (H. R. 10), which sought to grant specific exemption from section 10 of the Administrative Procedure Act and the Declaratory Judgment Act. (*House Report 1192*, 81st Congress 1st Session, p. 4).

In his recommendation for favorable action on H. R. 10, Mr. Justice Clark who was then Attorney General, assumed that declaratory judgment and review under the Administrative Procedure Act was then available in immigration cases. In a letter of May 20, 1949, the then Attorney General stated (*House Report 1192, supra*, p. 13):

> "Section 5 would enumerate certain circumstances under which provisions of the Administrative Procedure Act and the Declaratory Judgment Act of 1934 shall not be applicable to certain immigration and nationality statutes * * *"

H. R. 10 passed the House of Representatives. In the Senate, the bill failed of enactment after the Senate Judi-

ciary Committee had eliminated the foregoing Section 5. (*Senate Report 2239*, 81st Congress, 2d. Session).

Efforts to confine judicial review exclusively to *habeas corpus* by express language was made in Section 6 of S. 1832 (Senate Report 2230), 81st Congress, 2d. Session. The text of this section was later reintroduced as Section 106 of S. 3455, 81st Congress, 2nd Session. (See *infra*, notes 9 and 10).

Note should also be made that when the Immigration Service finally secured an exemption from the Administrative Procedure Act in the 1951 Supplemental Appropriations Act (P. L. 843, 81st Congress; 64 Stat. 1048), it was limited to Sections 5, 7 and 8. It did not include Section 10 of the Administrative Procedure Act.

2. *The original bills.* On April 20, 1950 Senator McCarran introduced the first omnibus bill to revise the immigration laws (S. 3455, 81st Cong., 2nd Sess.) which expressly provided in § 106 that determinations of fact should not be subject to review by any court and that determinations of law should not be subject to review by any court except through the writ of habeas corpus.[9] Similar provisions were contained in a revised bill, S. 716, introduced by Senator McCarran on January 29, 1951 (82nd Cong., 1st Sess.) and in H. R. 2379, introduced by Congressman Francis Walter on February 5, 1951 (82nd Cong., 1st

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[9] "Sec. 106. Notwithstanding the provisions of any other law—

(a) determinations of fact by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court;

(b) determinations of law by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court except through the writ of habeas corpus; and

(c) the exercise of discretionary authority conferred upon administrative officers by this Act or regulations issued thereunder shall not be subject to review by any court."

Sess.).[10] H. R. 2816 (82nd Cong., 1st Sess.), an omnibus bill introduced by Congressman Celler on February 22, 1951, omitted § 106 and contained no other comparable section restricting judicial review.

3. *Senate Report No. 1515 (81st Cong., 2d Sess.).*—The Government repeatedly (Br. 23, 33, 35) relies on the statement in this report (p. 629) submitted on April 20, 1950, when S. 3455, *supra*, was introduced, to the effect that "Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service." This statement that habeas corpus is the proper remedy to determine the legality of the detention of an alien in custody is not the equivalent, as the Government claims (Br. 33), of a statement that habeas corpus is the exclusive remedy for the review of a deportation order in respect of an alien not in custody. Obviously if an alien is in custody habeas corpus is a remedy to determine the legality of the detention, as in *Carlson* v. *Landon*, 342 U. S. 524 (1952), but that is quite a separate matter from judicial review of the legality of a deportation proceeding and the deportation order. Moreover, even if S. Rep. 1515 meant what the Gov-

[10] Section 106 of S. 716 and H.R. 2379 provided:

"Sec. 106. (a) Notwithstanding the provisions of any other law—

(1) determinations of fact by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court;

(2) determinations of law other than with respect to liability for the payment of deportation, detention, and related expenses by vessels, aircraft, or other transportation lines, or the master, commanding officer, owner, agent, or consignee thereof, or the imposition of fines and penalties by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court except through the writ of habeas corpus; and

(3) the exercise of discretionary authority conferred upon administrative officers by this Act or regulations issued thereunder shall not be subject to review by any court.

(b) Nothing in subsection (a) of this section shall be held to apply to court proceedings instituted under section 360 of this Act."

ernment says it means it would merely reflect approval of § 106 of S. 3455, barring review except by habeas corpus, which was later eliminated from the bill and from the 1952 Act.[11]

4. *Hearings on the bills.*—Joint hearings were held on these three bills and representatives of numerous organizations recorded their opposition to the provisions restricting judicial review and urged the continued application of § 10 of the Administrative Procedure Act. These organizations included representatives of the American Bar Association, American Civil Liberties Union; Americans for Democratic Action, American Jewish Committee, Association of Immigration and Nationality Lawyers, Common Council for American Unity, and National Catholic Welfare Conference.[12] *Joint Hearings Before the Sub-Committees of the Committees on the Judiciary on* S. 716, H. R. 2379, H. R. 2816, pp. 144, 446, 536-7, 591, 617, 699, 735, 739. It was understood that elimination of § 106 would leave § 10 of the Administrative Procedure Act applicable.

5. *The revised bills.*—The revised omnibus bills introduced later in the 82nd Congress, 1st Session (S. 2055,

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[11] In the interest of a complete record, although no reliance is placed on the point, it may be noted that it is not clear that S. Rep. 1515 represents the views of the entire Senate Committee on the Judiciary. It is noted that throughout the Report various recommendations and conclusions are stated to be those of the Special Sub-Committee to Investigate Immigration and Naturalization. Pages 332, 407, 412, 454, 510, 588, 609.

[12] The representative of the American Bar Association (Mr. Wasserman) stated (pp. 536-7):

> "We believe that determinations of immigration and naturalization matters as well as citizenship matters should be subject to judicial review provided by Section 10 of the Administrative Procedure Act."

The statement on behalf of the National Catholic Welfare Conference states (p. 735):

> "4. Section 106: It is our conviction that administrative decisions should not necessarily be final; rather that immigration and naturalization cases have the benefit of review by the courts as presently applies under the Administrative Procedure Act."

introduced by Senator McCarran on August 27, 1951 and H. R. 5678, introduced by Congressman Walter on October 9, 1951), and a subsequent revised omnibus bill introduced in the 82nd Congress, 2nd Session (S. 2550, introduced by Senator McCarran on January 29, 1952) eliminated § 106 of the prior bills and neither the prior § 106 nor its provisions appear in the 1952 Act. This elimination of § 106, in the light of the Joint Hearings, discloses the clear intent to continue judicial review under the Administrative Procedure Act as it was then practiced and understood.

S. 2842 (82nd Cong., 2nd Sess.), introduced on March 12, 1952 by Senator Humphrey for himself and twelve other Senators, was an omnibus bill differing in several respects from the McCarran and Walter bills but similar in the respect that it did not contain the eliminated provisions for the restriction of judicial review in former § 106.

6. *Senate Report 1137.*—The report of the Committee on the Judiciary (Report No. 1137, 82nd Cong., 2nd Sess.) submitted to the Senate on January 29, 1952 on S. 2055, explained that the elimination of the provisions contained in § 106 of the former bills was (p. 28) "not intended to grant any review of determinations made by consular officers, nor to expand judicial review in immigration cases beyond that under existing law". It is submitted that the existing law at that time, as understood by both the Members of Congress and the Bar generally, was the then well-known *Trinler* doctrine under which judicial review could be had not only by habeas corpus but also by an action or proceeding conforming to § 10 of the Administrative Procedure Act of 1946. This is made clear by the statement immediately following the above quotation from the report to the effect that the problem intended to be met by the language of the eliminated § 106 was solved by §§ 101(b)(4), 236 and 242(b) of S. 2055 (same sections in the 1952 Act) which make it clear that special inquiry

officers conducting exclusion and deportation hearings are governed by the special procedures of the 1952 Act rather than by the general administrative procedures required by §§ 5, 7 and 8 of the Administrative Procedure Act of 1946.[13] It is submitted that this report discloses the intention of Congress to eliminate the application of §§ 5, 7 and 8 of the 1946 Act but to continue review of deportation orders under § 10 of the 1946 Act as it then existed.

7. *House Report 1365.*—On February 14, 1952 the Committee on the Judiciary submitted its report (No. 1365, 82nd Cong., 2nd Sess.) on H. R. 5678 to the House and stated (p. 28) that the bill "7. Safeguards judicial review and provides for fair administrative practice and procedure (§§ 235, 242 and 360)." The report contains a discussion of the elimination of former § 106 (pp. 55-56) similar to that quoted above contained in S. R. 1137.

The Government's argument (Br. 22) that the elimination of § 106 merely eliminated any additional restrictions

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[13] The text of Report No. 1137, discussed above, reads as follows:

"In both S. 3455 and S. 716, the predecessor bills, it was provided that administrative determinations of fact and the exercise of administrative discretion should not be subject to judicial review and that the determinations of law should be subject to judicial review only through the writ of habeas corpus. This language is omitted from the instant bill. The omission of the language is not intended to grant any review of determination made by consular officers, nor to expand judicial review in immigration cases beyond that under existing law. The problem intended to be met by the language of the two predecessor bills *in relation to the administrative process* is solved by the language of sections 101(b)(4), 236 and 242(b) of the instant bill. Under the provisions of those sections, special procedures are established for the determination of whether or not an alien is subject to exclusion or deportation, under which proceedings are to be conducted before special inquiry officers specially qualified to conduct such proceedings and designated by the Attorney General pursuant to the provisions of the bill. These procedures are made the sole and exclusive ones in such matters. The exemption of deportation proceedings from certain of the provisions of the Administrative Procedure Act contained in the Supplemental Appropriation Act, 1951 (Public Law 843, 81st Cong.) is specifically repealed since the special procedures in the bill make such exemption no longer necessary." (Emphasis supplied)

on review in habeas corpus fails to meet the fact that both the hearings and the subsequent report contemplated that although special provisions in § 242(b) superseded §§ 5, 7 and 8 of the Administrative Procedure Act "in relation to the administrative process". Section 10 of that Act continued to be applicable in respect of judicial review of the administrative process.

8. *House debate.*—On April 24, 1952, during the House debate on the bill (H. R. 5678), Congressman Meader proposed an amendment to the provision of § 242(b) that the Attorney General's decision shall be final, to the effect that the order of deportation shall be subject to court review (98 Cong. Rec. 4415). Congressman Walter, co-author of the bill and of the Administrative Procedure Act, opposed this amendment as surplusage [14] and stated clearly that § 10 of the Administrative Procedure Act is applicable in the following statement (p. 4416):

> "Now we come to this question of finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned, but it is not final in that it is not the last remedy that the alien has. Section 10 of the Administrative Procedure Act is applicable." [15]

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[14] Answering an objection of the C.I.O. that the bill would emasculate judicial review Congressman Walter also declared (p. 4302):

> "The Administrative Procedure Act—do you remember the old Walter-Logan bill, which was subsequently enacted into law as the Administrative Procedure Act? Why, this question of unbridled authority in one person is almost an obsession with me. I am the last person in the world who would do anything to destroy the philosophy underlying that type of review."

[15] Immediately after this statement Congressman Walter went on to say that in addition to judicial review under § 10 of the 1946 Act the 1952 bill incorporated the philosophy underlying the 1946 Act which provides for fair administrative procedures as well as for judicial review of administrative action.

The Government attempts to nullify Congressman Walter's express statement that "Section 10 of the Administrative Procedure Act is applicable" by dismissing it as "based upon a serious misunderstanding as to the operation of the bill" (Br. 25). Congressman Walter is a member of the Bar and completely familiar with both the Administrative Procedure Act and the immigration bills when he made this statement. Any misunderstanding is the Government's misunderstanding of his statement by confusing what he said about § 10 with what he subsequently and separately said about §§ 5, 7 and 8 of the Administrative Procedure Act. It must be kept in mind that his statement was an extemporaneous oral explanation made in the course of floor debate. So read it is clear that Congressman Walter, first answering Congressman Meader's concern about judicial review, then separately went on to remark that in addition to judicial review under § 10 the substance of the administrative procedural safeguards of §§ 5, 7 and 8 had been embodied directly in § 242(b) of the immigration bill. Moreover, any momentary misunderstanding thought to be contained in Congressman Walter's extemporaneous remarks was plainly confined to the question whether §§ 5, 7 and 8 of the 1946 Act and the *Sung* decision, rather than § 10, involved judicial review. There was no misunderstanding or confusion whatever by Congressman Walter on the question presented here which is the affirmative intent of Congress to provide for judicial review of deportation orders by § 10 of the Administrative Procedure Act as he expressly stated.

9. *Senate debate.*—On May 21, 1952 in the Senate debate Senator McCarran, author of the bill, insisted that it was intended to continue the application of the Administrative Procedure Act except for the similar special provisions in respect of the conduct of exclusion and deportation pro-

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ceedings by special inquiry officers. Senator McCarran observed (p. 5717):

> "Except for the failure to comply strictly with the dual examiner provisions of the Administrative Procedure Act, I believe that the procedures set forth are in substantial compliance with the procedural rationale of the Administrative Procedure Act.
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> • • • • • • •
>
> "Let me stress this point, Mr. President: My consistent effort has always been to avoid or eliminate any and all blanket exemptions from the Administrative Procedure Act."

On the following day Senator McCarran stated (p. 5778):

> "the Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails **now.**
>
> • • • • • • • •
>
> "The bill provides for administrative procedures and makes the Administrative Procedure Act applicable insofar as the administration of the bill is concerned."

It was upon these assurances that many Senators voted in favor of the bill.

It is submitted that the elimination of provisions barring judicial review, the committee reports, and statements on the floor of Congress by the authors of the bills which became the 1952 Act, disclose the understanding that judicial review of deportation orders was provided as it then existed in actual practice pursuant to §10 of the Administrative Procedure Act. The fact that the Supreme Court subsequently determined that such judicial review was not available under the 1917 Act does not alter the fact that Congress plainly understood that it would be available under the 1952 Act.

The Government seeks support (Br. 28) in the rejection of Senator Morse's proposed amendment to §242(b) of the bill to make the administrative hearing provisions of the Administrative Procedure Act applicable to exclusion and deportation proceedings and also to provide expressly for judicial review of exclusion and deportation orders by declaratory judgment actions (28 U.S.C. 2201) as well as by habeas corpus (98 Cong. Rec. 5781, 5630). Senator McCarran's expressed opposition to this amendment on the ground that it would make exclusion orders reviewable by declaratory judgment actions (98 Cong. Rec. 5789) does not support the inference that the rejection of the amendment discloses the understanding of Congress that deportation orders were not reviewable under §10 of the Administrative Procedure Act. [16]

10. *Conference Report.*—The statement of the Managers on the part of the House which accompanied the conference report of the Committee of Conference on the disagreeing votes of the two Houses on the amendment of the Senate to H. R. 5678 (House Report No. 2096, 82nd Cong., 2nd Sess. of June 9, 1952) states (p. 127):

> "(2) Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework and the pattern of the Administrative Procedure Act. The safeguard of judicial procedure is afforded the alien in both exclusion and deportation proceedings."

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[16] The Government gains no support from rejection of the amendments proposed by Senators Lehman and Moody because these amendments were rejected on the basis of provisions other than those pertinent to judicial review. Moreover, views of opponents of the bill are not enlightening on the intent of Congress. *National Labor Relations Board* v. *Thompson Products*, 141 F. 2d 794, 798 (C.A. 9, 1944).

Thus, after extensive consideration of the bill in committees and on the floor of Congress it was agreed that in respect of judicial review the bill provided procedures within the framework and pattern of the Administrative Procedure Act. It is submitted that this statement can only mean that Congress understood deportation orders were subject to judicial review pursuant to §10 of the Administrative Procedure Act.

E. Practical Considerations

The Government argues (Br. 39-40) that the decision of the Court below suggests that exclusion orders as well as deportation orders may be judicially reviewed in proceedings other than habeas corpus. The Court below did not so state and it does not necessarily follow that because deportation orders under § 242 (8 U. S. C. 1252) are subject to judicial review, contemplated by the text of that section, exclusion orders under §236 (8 U.S.C. 1226) are similarly subject to judicial review. The finality clause of §236(c) unlike the finality clause of §242(b), is not qualified either by a direct reference to "judicial review" in the text of §236 or by a requirement that no decision of exclusion shall be valid unless based on reasonable, substantial, and probative evidence.

Moreover, even if no distinction were made in respect of the mode and scope of judicial review of exclusion and deportation orders, it does not follow that Congress did not intend any such review. If, as respondent contends, Congress did intend that deportation orders would be reviewable under §10 of the Administrative Procedure Act it does no violence to the text of the statute or the expressed intention of the statute to review exclusion orders in the same manner unless and until Congress chooses to amend the law. It does not appear that such review of exclusion

orders would burden the courts any more than habeas corpus proceedings, or would result in any improper interference with an excluded alien's custody.[17]

The Government agrees that strong practical considerations favor judicial review of deportation orders other than by habeas corpus which requires that the alien be in custody before he can sue out a writ.[18] In the absence of a plain Congressional prohibition, not present here, an alien resident should not be refused the opportunity to litigate the legality of a deportation hearing and a deportation order until he is detained by the Government, his opponent in the litigation, with the inescapable difficulties of conducting his case from a detention cell. Bail is at best a precarious alleviation of this difficulty when it is considered that the Government argues that § 242 of the 1952 Act restricts review of the Attorney General's denial of administrative bail to the question whether the Attorney General is proceeding expeditiously, and Rule 45 of this Court provides that bail pending appeal is not allowed if the writ is refused.[19] As a practical matter habeas corpus is not a

[17] The remark of Senator McCarran on the floor of the Senate to the effect that judicial review of exclusions orders had not previously been granted (98 Cong. Rec. 5789) does not mean that the 1952 Act did not grant such review if that is the normal consequence of the language used in the statute.

[18] The Department of Justice has prepared a proposed bill on the matter. On November 13, 1952 Acting Solicitor General Robert L. Stern stated in a letter to the President's Commission on Immigration and Naturalization (Hearings Before the Commission, 82 Cong. 2nd Sess., p. 1353) that "there is general agreement that such [deportation] orders should be subject to judicial review as soon as they are administratively final" and review should not be restricted to the remedy of habeas corpus after being taken into custody. Mr. Stern's letter admitted that the requirement of custody in habeas corpus actions to test deportation orders was "inconvenient to the alien and of no corresponding benefit to the Government". Attorney General Brownell supported this view in his report to the Judicial Conference on September 24, 1953 (Brief in Opposition, p. 6).

[19] Alien seeking release on habeas corpus pending decision on the merits of their writ experience months of detention and frequently are required

complete and adequate remedy and a resident alien should not be restricted to it unless and until Congress expressly so requires. Another practical consideration is that if an alien in detention is unable to obtain bail or judicial stay of deportation pending judicial review, and the Department of Justice opposes such stays, and he is deported or leaves voluntarily while his case is pending, the habeas corpus proceeding becomes moot.[20] The alien cannot continue to litigate the legality of the deportation order even though its practical effects are not moot because he may wish to return to the United States but if deported is not permitted to apply for a visa without the Attorney General's permission (§ 212(a)(17) of the 1952 Act).

It is submitted that insofar as any practical considerations are relevant there is no such consideration warranting refusal to give effect to the intent of Congress to allow judicial review other than habeas corpus to be found in the text of the statute and its history. There are strong practical considerations for giving effect to this intent of Congress to make available judicial review not requiring the

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to appeal to Justices of this Court or the full Court before they are released. *U. S. ex rel. Accardi* v. *Shaughnessy*, (No. 366, October Term, 1953—Detained seven months before release by order of full Court); *Carlson* v. *Landon*, 342 U.S. 524 (Petitioners were detained seven months before released by order of this Court). See also: *Galvan* v. *Press*, (No. 407, October Term, 1953) and *Yamish* v. *Barber*, 91 Law Ed. (Advance) 793, 73 S. Ct. 1105 (May 16, 1953).

[20] Although the dissenting member of the Court of Appeals assumed that aliens would not be deported pending judicial review and that therefore injunctive relief was unnecessary, the contrary has been demonstrated. In the past year in at least two instances known to counsel herein, where injunctions were not sought, the Attorney General deported aliens notwithstanding the pendency of judicial review. *Michelino* v. *Brownell*, Civil Action No. 3596, 1953 (Dist. of Col.). On August 25, 1953, the United States Attorney advised counsel that the action was moot because Michelino had been deported. Likewise in *Vassilatos* v. *Brownell*, Civil Action No. 3493, 1953 (Dist. of Col.), the action was dismissed after the alien had been deported pending judicial review.

alien to be in governmental custody before seeking judicial review by habeas corpus.

POINT II

II. Declaratory Judgment Is Appropriate

Apart from the Administrative Procedure Act, it is submitted that declaratory judgment is available under 28 U.S.C. 2201. It is true that prior to 1934 when the Declaratory Judgment Act was enacted the courts refused declaratory judgments and injunctive relief from deportation orders. These cases are set forth in footnote 2, *Heikkila* v. *Barber, supra. Fafalios* v. *Doak*, 50 F. 2d 640 (C. A. D.C., 1931) denied a bill in equity upon the ground that the remedy at law was adequate. *Poliszek* v. *Doak*, 57 F. 2d. 430 (C.A. D.C., 1932) and *Kabadian* v. *Doak*, 65 F. 2d. 202 (C.A. D.C., 1933) denied writs of prohibition because of the availability of habeas corpus—a remedy at law. In *Darabi* v. *Northup*, 54 F. 2d. 70 (C.A. 6, 1931) the alien brought habeas corpus together with a bill in equity. The lack of merits of both actions resulted in the denial of relief. *Imperiale* v. *Perkins*, 66 F. 2d 805 (C.A. D.C., 1933) was a petition for the suppression of evidence taken from an alien prior to the institution of contemplated deportation proceedings or criminal action. The court held that the action was not maintainable and that it was premature, stating: "The jurisdiction of the courts is . . . usually to be exercised by a writ of habeas corpus ex post facto of an order of deportation." *Azzolini* v. *Watkins*, 172 F. 2d. 897 (C.A. 2, 1949) merely contains a *dictum* on the subject based upon the *Kabadian and Imperiale* cases, *supra.* The *Azzolini* case was overturned on the merits in *Sung* v. *McGrath*, 339 U. S. 33 (1949).

The foregoing decisions, rendered prior to 1934 are not persuasive or controlling under the Declaratory Judgment

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Act. In addition it should be observed that since the promulgation in 1938 of Rule 57 of the Rules of Civil Procedure (Appendix p. 72 herein), declaratory judgment may not be denied upon the basis of the existence of a remedy at law.

Under 28 U. S. C. 2201, in case of actual controversy, except with regard to Federal taxes, any court of the United States, upon filing an appropriate pleading, may declare the rights and other legal relations of any interested party.

The prerequisites for obtaining declaratory relief are: (1) a justiciable controversy; (2) A controversy between adverse parties; (3) A tangible legal interest in the controversy by the party asserting it; (4) An issue ripe for adjudication. *Duvall, Declaratory Judgment Actions: Present-Day Uses of a Tested Procedure* [34 American Bar Association Journal (1938) 379].

All four factors noted above exist in the instant case. In a similar situation, declaratory judgment has been deemed appropriate. In *Perkins* v. *Elg* (District of Columbia, Equity 63, 408) Judge Bailey held:

> "According to the allegations of the bill, the Department of Labor has notified the plaintiff that she is illegally within the United States and has required her to leave the United States, and in case of her not doing, she would be deported as an alien. *Her only recourse would be to submit to arrest and then seek the issuance of a writ of habeas corpus. I think that this belongs to a class of cases for which a declaratory judgment is eminently suited.*" (Italics supplied).

The Court of Appeals for the District of Columbia on review said (99 F. 2d. 408):

> "Appellants, Secretary of Labor and Commissioner of Immigration, are required by law to deport aliens illegally in this country and in accordance with law they have threatened her (plaintiff's) arrest and deportation. * * * She has not yet been arrested and there-

> fore she cannot now test by habeas corpus the question raised here; but she is entitled to a declaration of her political status, for her rights as a citizen are valuable rights—certainly no less than property rights—and an actual and vital controversy exists between her and the government in relation to them. *The right to be immune from threats of deportation* and from the declarations of public officials that she is an alien and subject to arrest, *is, we think, a right within the declaratory judgment act entitling Miss Elg to prosecute this suit.*

Upon review by the Supreme Court (307 U.S. 325) it was ruled that:

> "The court below, properly recognized the existence of an actual controversy with the defendants (Aetna *Life Ins. Co.* v. *Haworth*, 300 U.S. 227) * * * and we think the decree should include the Secretary of State as well as the other defendants."

The issue in this case is one of deportability rather than citizenship. The "construction and interpretation of statutes and ordinances and the question of their application to the plaintiff is a common question of declaratory action." *Borchard, Declaratory Judgments* (2nd ed., 1941) pp. 788-789. There can be no dispute that the issues here presented fall into this category of cases and it is immaterial whether the issues be concerned with citizenship or deportability.

A. A Justiciable Controversy Is Presented by a Proper Party

There is no dispute as to the existence herein of a controversy between adverse parties, nor that respondent can properly test the validity of the deportation order herein. The issues of law raised by the complaint are justiciable.

Justiciability can hardly be made dependent upon the fact that declaratory judgment is sought here rather than

habeas corpus. The issues herein are issues of law, issues which have always been cognizable judicially under Article III of the Constitution.

B. The Issue Is Ripe for Judicial Adjudication

When the Attorney General directed respondent's deportation on December 29, 1952, the administrative adjudicatory process came to an end. The case then became appropriate for judicial review to determine whether a valid order of deportation had been entered. The opposing parties herein are in disagreement on this issue.

> "The actuality of the plaintiffs' need for a declaration of his rights is therefore of decisive importance." *Eccles* v. *Peoples Bank*, 333 U. S. 426 (1948).

That there is a need for a declaration of respondent's rights herein is clear. Declaratory judgment will permit an adjudication of the legal relationships herein without requiring expense to the government and inconvenience to the alien which is attendant where he is detained pursuant to an order of deportation. Unlike habeas corpus which requires adjudication after an alien is detained, declaratory judgment will permit an adjudication prior to detention. If habeas corpus is the exclusive remedy herein, then there is no way in which an alien can secure a judicial determination of his status without surrendering himself to the inconvenience and expense of detention while litigation is instituted and his rights determined.

> "Declaratory judgment procedure * * * may be operative before statutory forms of review are available and may be utilized to determine the validity or application of any agency action." *House Committee Report* 1946, p. 42; Senate Document 248, 79th Congress, p. 276.

See also: *Final Report of the Attorney General's Committee on Administrative Procedure*, Senate Document 8, 77th Congress, 1st Session at p. 81.

"The distinctive characteristic of the declaratory judgment is that it adjudicates the legal issues between the parties, without providing for the coercive action of execution or performance." *Duvall, supra.*

This is the very purpose of declaratory judgment which will be served herein.

Point III

Heikkila v. Barber Should Not Be Extended to Preclude Review Herein

For the reasons set forth in petitioner's brief in *Shung* v. *Brownell*, (No. 241, October, 1953 Term, pp. 7-22) we entertain serious doubts as to the soundness of *Heikkila* v. *Barber*, 345 U. S. 229. Its application should therefore be strictly limited to proceedings instituted prior to December 24, 1952 if its doctrine is to be followed.

1. *Heikkila* v. *Barber* erroneously assumes that *Lem Moon Sing* v. *United States*, 158 U. S. 538 (1895) and *Fok Young Yo* v. *United States*, 185 U. S. 296 (1902) are still controlling. These cases decided under the Chinese exclusion statutes denied judicial review of issues of law, even in habeas corpus proceedings. Significantly the statute then specifically recognized habeas corpus review. (27 Stat. 25; 8 U. S. C. 286). These Chinese exclusion cases were qualified by *Geigow* v. *Uhl*, 239 U. S. 3 (1915) which held that the finality provisions of the general immigration statute only referred to conclusiveness upon issues of fact.

2. The *Heikkila* case erroneously assumes that judicial review in immigration cases is limited to review required by the Constitution (345 U. S. 234-5). In *Geigow* v. *Uhl*,

supra; Johnson v. *Shaughnessy,* 336 U. S. 806 (1949); and *McGrath* v. *Kristensen,* 340 U. S. 162 (1950) [21] judicial review in immigration cases was permitted although not required by the Constitution.

3. The *Heikkila* case erroneously concludes that declaratory judgment is unavailable in deportation cases. Point II, *supra,* reviews the proper application of the Declaratory Judgment Act herein.

4. The fourth error of the *Heikkila* case is the assumption that habeas corpus is the exclusive remedy (345 U. S. 237). Where Congress had habeas corpus in mind, it specifically referred to that remedy as in the 1892 Chinese Exclusion Act (27 Stat. 25; 8 U. S. C. 286) and in the 1952 Immigration Act for certain purposes (8 U. S. C. 1503). Congress has never said that the validity of deportation orders can be tested only in habeas corpus proceedings.

5. Finally, the *Heikkila* case erroneously holds that the 1917 immigration statute is one which precludes judicial review. Ever since the *Geigow* case, the finality of immigration decisions has not precluded judicial review to determine whether the administrative action contravened the Constitution, the statute, or whether it was reached without a fair hearing or supporting evidence. *Lloyd Sabaudo Societa Anonima* v. *Elting,* 287 U. S. 329 (1932).

Judicial review of cases governed by a statutory declaration of finality is not limited to habeas corpus. De-

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[21] In the *Heikkila* opinion this Court comments that Kristensen litigated an erroneous determination of "status" in respect of eligibility for citizenship. But in that case the question of *Kristensen's* eligibility for citizenship arose in a deportation proceeding under Sec. 19 of the 1917 Act (8 U.S.C. 155-e-2) which provided that any alien who is deportable might receive voluntary departure in lieu of deportation or suspension of deportation if not ineligible to naturalization. Under the statute *Kristensen* had to be deportable to be eligible for suspension of deportation and his status as an alien, even a deportable alien, was not disputed and the relief he sought was against a final order either of voluntary departure or of deportation.

pending upon the nature of the case, and the available judicial techniques, review may otherwise be had, *e.g., Lloyd Sabaudo Societa Anonima* v. *Elting, supra* (review in an immigration case by suit to recover fines); *Perkins* v. *Elg, supra,* and *McGrath* v. *Kristensen, supra* (review in deportation cases by declaratory judgment actions); *Estep* v. *United States,* 327 U. S. 114 (1946) (review in selective service case by defense of improper classification asserted in a criminal trial).

Mr. Justice Holmes in the *Geigow* case, involving an excluded alien, declared that finality under our immigration statutes meant "conclusiveness upon matters of fact" only. Thus it is clear that the finality involved in immigration decisions under the 1917 Immigration Act is effectuated when judicial review is restricted to the *type of issues* historically deemed proper for the court—*matters of law,* to use a shorthand expression. Such *finality* is not concerned with the method of obtaining review, since obviously review in declaratory judgment actions can be as strictly limited in scope as review in habeas corpus—to naked questions of law. The Government's finality argument restricting review to habeas corpus was rejected in the *Kristensen* case, and it was decided that a cause ripe for declaratory judgment had been established. *McGrath* v. *Kristensen, Perkins* v. *Elg, Geigow* v. *Uhl,* can not remain as controlling law at the same time with *Heikkila* v. *Barber.* If finality of immigration decisions preclude judicial review, it matters not whether review be in habeas corpus or declaratory judgment and it matters not whether the issue be one of eligibility to citizenship or deportability.

Thus is thrown in bold relief the error of the *Heikkila* case. From any legitimate viewpoint of administrative finality, it matters not one whit whether a narrow issue of law be reviewed by habeas corpus or by the more civilized

method of a declaratory judgment action. The latter permits adjudication of an issue of law by an alien without the necessity of arrest, confinement and severance from his family, friends and employment.

Point IV

The Court of Appeals Properly Directed the Issuance of a Preliminary Injunction

If declaratory judgment or review under the Administrative Procedure Act is maintainable, as we contend, then injunctive relief was appropriate as directed below. The Government contends that injunctive relief was improper because (1) it was threatening to enforce the order of deportation by mere apprehension of respondent and had not yet made up its mind to detain him; (2) Section 242(c) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1252-c) grants petitioner unlimited and unreviewable discretion to detain; (3) the threat of detention under Section 242(c) can only be defeated by an allegation and proof that the Attorney General is not proceeding with due diligence; and (4) that the Court of Appeals erroneously concluded that issues were presented which were required to be heard. W submit that the Government's position is not supported either by the record herein or the applicable law.

The Court below correctly held that the question of the legality of the respondent's proposed detention by the Attorney General is governed by the principles of *Carlson* v. *Landon*, 342 U. S. 524 (1952), and that on the *facts of this record* his arrest and detention would be a clear abuse of discretion and should be enjoined (R. 24).

The Government contends (Br. 41-54) that §242(c) of the 1952 Act was intended to limit the *Carlson* doctrine and make a refusal of bail reviewable, even in habeas corpus, only upon a conclusive showing that the Attorney General is not proceeding with reasonable dispatch to effect

the alien's deportation. At the conclusion of this argument (Br. 52) the Government recognizes that it proves too much because it requires a conclusive showing of the practically impossible, namely, that the Attorney General is not proceeding to deport an alien during the period of judicial review to prevent the deportation. The respondent contends (A) that the statute plainly does not have such an impossible meaning; (B) that the Fifth Amendment requires that respondent be relieved from detention, (C) that detention for deportation without a place of deportation named in the warrant or order of deportation is unlawful, (D) that this action has merit, and (E) that judicial discretion was properly exercised in granting the preliminary injunction.

At the outset it warrants emphasis that there are two factual obstacles to the Government's position. In the first place the Government has not contested the facts upon which the Court below granted the preliminary injunction, including the Government's admission in the Court below that "no injury to the public interest is to be anticipated from postponing appellant's arrest" (R. 14).

A second factual obstacle to the Government's position is that there is not available to the Government at this time its argument that the Attorney General has not yet exercised his discretion to detain or release respondent pending judicial review and that the exercise of this discretion should not be enjoined. On this record the question presented is whether the Attorney General, having determined to detain the respondent pending judicial review in an effort to deport him, may be enjoined from doing so *pendente lite* in the circumstances presented. The Government failed completely to deny the allegations in support of the preliminary injunction that if defendant below is not enjoined the plaintiff below "will be taken into custody and deprived of his liberty until such time as the proceeding has been determined" and that "in all similar cases, the

defendant has authorized the continuation of bail for persons similarly situated during judicial review, and defendant's denial of the continuation of bail herein constitutes an abuse of discretion" (R. 5). Originally in the District Court the Government apparently was content to accept the truth of these allegations, or to treat them as immaterial, and to rely on its legal argument that only in habeas corpus may respondent seek judicial review. The Government supports respondent's contention that he would be detained pending judicial review and during the period attempts might be made to deport him by the statement in their brief (p. 42) that on December 30, 1952, the surety company on the respondent's bond was directed to surrender him "for deportation".[22]

If respondent had been relegated to detention and habeas corpus these allegations might have become immaterial because respondent's continued detention would have established the Attorney General's determination which respondent here alleges has already been made. In any event, at this time and on this record the Government has not denied the allegations on which the preliminary injunction has been granted and is restricted to arguments available on the facts, as alleged, that the Attorney General

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[22] The Attorney General confirmed this when he publicly announced his decision to detain Rubinstein in the Department of Justice Press Release of December 29, 1952 which stated in part:

> "Attorney General James P. McGranery today ordered Serge M. Rubinstein, Russian-born financier residing in New York City, *taken into custody for deportation.*"
>
> • • • • • • •
>
> "Rubinstein will be given until 10 A. M. tomorrow to surrender in the New York office of the Immigration and Naturalization Service. *He will be sent to Ellis Island pending arrangements for his deportation from the country.*"

has determined to detain respondent pending judicial review.[23]

The threat to *detain* Rubinstein conforms, not to the pious hope of Government counsel herein that immigration officials intend to exercise a reasonable discretion over the respondent, but rather to the arbitrary prejudgment of detention by the Department of Justice. After the institution of this litigation, a letter of the Assistant Commissioner of Immigration, dated October 4, 1952 became public (*Hearings before the President's Commission on Immigration and Naturalization*, 82d Congress, 2d Session, pp. 1953-4). He advised the President's Commission as follows:

> "* * * we believe that the Government should avail itself to the fullest extent of the detention provisions of section 23 of the Internal Security Act and, when it becomes effective, to section 242 of Public Law 414, *not only as to those aliens in whose cases the Service cannot procure travel documents* but in the cases of all aliens who are in the United States illegally who are not eligible for any form of discretionary relief, and who refuse to depart from the United States, continuously, of course, bearing in mind that there will al-

[23] If the Government merely intended to reconsider the amount of the bond or terms of parole there was no reason to depart from the usual practice of inviting the alien ordered deported to appear at an immigration office for an interview. The unusual practice of an immediate demand on the surety to surrender the alien for deportation indicates that a decision had been made to hold the alien for deportation. A partial listing of some of the deportation cases in which the usual practice was followed in the District of Columbia and detention and deportation were stayed pending judicial review without requiring the alien to surrender into custody includes *Lewin* v. *McGrath* (C.A. No. 10,338); *Sardo* v. *McGrath* (C.A. No. 10,363); *Tack* v. *McGrath* (C.A. No. 10,379); *Machado* v. *McGrath* (C.A. No. 10,445); *Rasmussen* v. *McGrath* (C.A. No. 10,514); *Guggenheim* v. *Miller* (C.A. No. 10,323); *Wing* v. *McGrath* (C.A. No. 10,509); *Teng* v. *McGrath* (C.A. No. 10,510); *Foo* v. *McGrath* (C.A. No. 10,511); *Swarez* v.*McGrath* (C.A. No. 10,512); *Yuen* v. *McGrath* (C.A. No. 10,513).

ways be cases requiring special action because of humanitarian or other considerations."

It thus becomes clear, that Rubinstein, was to be detained without bond, in view of the fact that he was a stateless alien, for whom the Immigration Service could not procure travel documents to effectuate deportation.

A. The Statutory Power to Detain

The authority of a Government official to arrest and detain any person residing in the United States, alien or citizen, must be found in some valid statute. Section 19 of the Immigration Act of 1917 (8 U.S.C. 155) provided that aliens believed to be deportable "shall, upon the warrant of the Secretary of Labor, be taken into custody and deported * * * ". Section 20 (8 U.S.C. 156) originally provided that pending the final disposal of the case of any alien so take into custody he might be released under a bond of not less than $500 conditioned that he should be produced when required for a hearing and for deportation.[24] Section 23 of the Internal Security Act of 1950 (64 Stat. 987) amended § 20 of the 1917 Act to provide, in somewhat similar language to that now found in the 1952 Act, that pending final determination of deportability and also for a period of six months after an order of deportation the Attorney General in his discretion may continue the alien in custody, release him under bond, or on conditional parole. No express provision for judicial review of the Attorney General's bail determinations under this section was provided but it was held that the denial of bail during the administrative proceeding could be judicially reviewed and that on the facts of particular cases the re-

[24] Subsequent deportation statutes provided that aliens be taken into custody and deported in the manner provided in the 1917 Act (8 U.S.C. 137, 157, 214).

fusal of bail was not a denial of due process of law under the Fifth Amendment. *Carlson* v. *Landon, supra.*

Section 242(a) of the 1952 Act authorizes the alien's arrest and custody, or release on bond or conditional parole, "until final determination of his deportability". A limited court review is expressly provided upon a conclusive showing in habeas corpus that the Attorney General is not proceeding with reasonable dispatch to determine deportability. These statutory provisions govern control over the alien during the period of administrative proceeding to determine deportation between the issuance of the warrant of arrest and the order and warrant of deportation.

Section 242(c) governs control of the alien during the period of six months from the date of the final order of deportation "under administrative processes" or, if judicial review is had, from the date of the final order of the court.[25] During this six months period, at the Attorney General's discretion, the alien may be detained or released on bond or on conditional parole. The limited judicial review provided in § 242(a) is repeated in § 242(c).

Subsection (d) of § 242 authorizes regulations for the supervision of aliens against whom final orders of deportation have been outstanding for more than six months. Subsection (e) contains a provision for further control of certain classes of aliens ordered deported by making it a felony for any such alien wilfully to fail or refuse to make timely application in good faith for travel or other documents necessary for departure. *United States* v. *Spector*, 343 U.S. 169 (1952).

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[25] The explicit language of § 242(c) cured the ambiguity of § 23 of the Internal Security Act of 1950, which did not make it entirely clear whether this six months period began with the final administrative order or with the final court order if judicial review were had.

Section 242 read as a whole discloses the complete and detailed statutory scheme authorizing detention of an alien during the administrative process and during the period of six months after a fina' court order reviewing a deportation order and authorizing supervision other than detention and prosecution in certain cases after this six months period. The complete absence of any authorization of detention during the period of judicial review was not inadvertent but a deliberate recognition that there can be no deportation during judicial review and that therefore there is no reason to provide authority to detain for deportation during judicial review. The purpose of authorizing detention, or bond or parole in lieu thereof, in § 242(a) is to insure that the alien shall be produced for a hearing and eventually for deportation. Section 242(c) authorizes detention, or a bond or parole in lieu of detention, during the six months period after judicial review of the deportation order in order to have the alien available to effect his departure from the United States. Sections 242(d) and (e) have similar purposes. But since deportation during judicial review was not contemplated by Congress there was no reason to authorize detention during judicial review in order to effect deportation and therefore Congress deliberately omitted any authorization to detain an alien for deportation during judicial review.

The Court below thought that Congress did not mean to withhold authority to arrest an alien no matter what the circumstances during the period of judicial review and in order to fill the gap construed § 242(a) as applicable during this period (R. 23). The Government argues that if respondent was in custody he would be relegated to habeas corpus and since under the provisions of §§ 242(a) and (c) review would be limited to reasonable dispatch therefore

during the period not covered by these subsections review should be similarly limited and respondent should be relegated to this patently inadequate remedy. Respondent submits that because Congress provided a limited examination of detention for the periods before and after judicial review it cannot be concluded that Congress intended to restrict judicial examination of detention in the same manner during the period of judicial review. In the absence of a clear expression of the intent of Congress to this effect it is more reasonable to conclude that Congress intended to do what it did, namely, during the period of judicial review to leave the matter of detention entirely to the courts.

B. Detention of Respondent, Concededly Not a Security Risk, Pending Judicial Review, Would Violate His Constitutional Rights Under the Fifth Amendment

The record supports the conclusion that petitioner is threatening to apprehend and detain Rubinstein. The Attorney General has offered no reason for his insistence that Rubinstein be detained on the warrent of deportation "for deportation" pending judicial review. The Attorney General's concessions below that Rubinstein is not a security risk, and that the warrant of deportation does not name a place of deportation, and that no place of deportation has been determined, and that it is not intended to attempt to deport him during judicial review, make it clear that the Government has no reason for Rubinstein's detention which can bear judicial scrutiny. The Attorney General has not on this record, answered the complaint or filed any affidavit in opposition to the motion for preliminary injunction, or in any way presented any facts in support of his naked assertion of absolute power to detain Rubinstein without giving any reason during the period of judicial review.

The courts, however, have authoritatively determined that there is a constitutional basis for review of the Attorney General's denial of, or revocation of, administrative bail. The Government has not heretofore urged in the Supreme Court that the Attorney General's discretion is not subject to judicial review. *Carlson* v. *Landon, supra,* at page 540. The courts have pronounced the Attorney General's action to be arbitrary and have ordered that bail be granted unless the Attorney General shows facts by affidavit disclosing the most compelling reasons for such deprivation of personal liberty pending determination of a civil deportation proceeding. *Carlson* v. *Landon, supra; U. S. ex rel. Heikkinen* v. *Gordon,* 190 F. 2d 16 (C. A. 9, 1951); *U. S. ex rel. Pirinsky* v. *Shaughnessy,* 177 F. 2d 708 (C. A. 2, 1949); *U. S. ex rel. Potash* v. *Shaughnessy,* 169 F. 2d 747 (C. A. 2, 1948); *U. S. ex rel. Klig* v. *Shaughnessy,* 94 F. Supp. 157 (S.D.N.Y., 1950).

In the *Carlson* case, *supra,* the aliens were granted bail of five thousand dollars each by the Supreme Court pending appeal (190 F. 2d at p. 21) even though the evidence offered by the Government supported a final determination that the Attorney General had established sufficient facts of subversive leadership activities to warrant revocation of bail. *A fortiori,* Rubinstein here should be at large on his present bail of one thousand dollars pending judicial determination where there is not even a claim of subversive activities and no offer by the Government of any facts warranting detention. The opinion of the Court in the *Carlson* case (342 U.S. at p. 542) makes it clear that it is denial of due process under the Fifth Amendment to refuse bail in the absence of a reasonable apprehension by the Government that the alien at large will be a security risk or not appear for hearings or deportation when required. The separate dissenting opinions of Mr. Justice

Black, Mr. Justice Frankfurter, Mr. Justice Douglas and Mr. Justice Burton serve to emphasize the application of the Fifth Amendment.

In the *Pirinsky* and *Klig* cases, *supra*, where some contention could be made that public safety was involved, the courts pronounced revocation of bail arbitrary and required that the aliens be continued on bail.

In the instant case, it is asserted (R. 5) and not denied, that the Attorney General has refused to continue Rubinstein's bail, although the practice has been otherwise in similarly situated cases. Throughout the case, as disclosed by the record, the Attorney General has asserted the intention to detain Rubinstein "for deportation."

This, then, is not a case where the Attorney General intends to exercise discretion if he should be permitted to secure custody of Rubinstein. Upon this record, it is established that he has already made a determination not to release him on bail when apprehended. Were the situation otherwise, the Government would not be making the extreme contention in the courts below and in this Court that under 242(c) of the 1952 Immigration and Nationality Act even during the period of judicial review he has absolute power to detain an alien subject only to limited examination on habeas corpus. The Government asserts that during the period of judicial review, when deportation will not be effectuated, it has arbitrary and despotic power to detain under Section 242(c), subject to review only in habeas corpus upon a show of lack of "reasonable dispatch" on the part of the Attorney General. Obviously, during this period the Attorney General is not required or authorized to effectuate deportation or any other action with "reasonable dispatch." Detention without cause for six months with a limited ineffectual right of habeas corpus

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unlawfully and unconstitutionally suspends the operation of that great writ.

Stated in simplest form, the position of the Government (Brief p. 51) is that an alien cannot litigate the validity of a deportation order until he has completed six months of confinement at Ellis Island. If the Attorney General does not take him into custody he would never have an opportunity to test the validity of a deportation order according to this theory. Even though the Attorney General is acting wrongfully, the Government would not permit an attack upon the validity of the deportation order during the first six months of custody. During that period, it is claimed, the only permissible attack is whether the Attorney General is proceeding with dispatch to carry out a deportation which may have no warrant in law at all.

The claim of such arbitrary powers by the Government under Section 242(c) is not only contrary to the constitutional principles enunciated in *Carlson* v. *Landon*, 342 U. S. 524, but has been specifically rejected in every case in which it has been asserted under the 1952 Immigration and Nationality Act. *U. S. ex rel. Yaris* v. *Esperdy*, 202 F. 2d 109 (C.A. 2, 1953); *U. S. ex rel. Nukk* v. *District Director*, 205 F. 2d 242 (C. A. 2, 1953); *Yanish* v. *Barber*, 91 Law Ed. (Advance) 793, 73 S. Ct. 1105 (May 16, 1953) and *Rubinstein* v. *Brownell*, 206 F. 2d 449 (C.A.D.C., 1953). This unusual claim of arbitrary powers, so at variance with our constitutional and democratic concepts, is unworthy of acceptance.

In *U. S. ex rel. Yaris* v. *Esperdy*, *supra*, the court rejected the Government's contention that Section 242(a) [containing the same language as Section 242(c)] limited judicial review of the legality of detention in the following language:

> "In the absence of clear language to the contrary, we cannot construe the statute to give the Attorney

> General unbridled license to exercise his discretion as to detention in whatever arbitrary or capricious way he might see fit, provided only that he act with reasonable dispatch to obtain a decision as to the alien's deportability. On the contrary, we think his discretion as to keeping an alien in custody is judicially reviewable to the same extent it was before. Section 242 provides but an added statutory recognition of a basis for judicial review, not a limitation upon the power as it had existed."

In *Developments in the Law, Immigration and Nationality*, 66 *Harvard Law Review* 643, 700 (March, 1953) it is stated concerning these statutory limitations on judicial review:

> "Moreover, it may be interpreted as denying a court the power to release on other grounds, such as initial arbitrariness in ordering confinement. So construed this provision might be held a denial of due process."

It should also be noted that Rubinstein was ordered to surrender for deportation and this without any adequate notice or hearing on revocation of bail. Even a convict may not have his parole revoked without notice and substantial evidence justifying such action. He is entitled to fair treatment and to be protected from official whim or caprice. *Burns* v. *United States*, 287 U. S. 216, 223 (1932); *Compagna* v. *Hiatt*, 100 F. Supp. 74, 80 (N. D. Ga., 1951). See also 65 *Harvard Law Review*, 309. *A fortiori* an alien in a civil deportation proceeding is entitled to notice and hearing on revocation of bail.

It is submitted that under the authorities cited it is entirely clear that the threatened detention of Rubinstein "for deportation" is capricious, oppressive and punitive and a denial of due process of law guaranteed to him by the Fifth Amendment to the Constitution.

C. Apprehension or Detention for Deportation Prior to Ascertainment of a Place of Deportation Named in the Order or Warrant of Deportation Is Unlawful

The respondent is a stateless person who does not have the right to enter any foreign country and is in the position of many stateless former Russian subjects in the United States who fled the communist regime and are at large under deportation orders because there is no country to which they can be deported. Senate Report No. 1515, *supra*, states (p. 637): "that there are 3,600 nonenforcible deportation orders, of which 1,365 involve Russians". Government counsel conceded in the Court below that the warrant of deportation under which it is sought to arrest and detain respondent does not name a place of deportation and that no place of deportation has been determined. The form of warrant of deportation which is in use contains a blank space into which is to be inserted the foreign place of deportation. This warrant, which is the authority for the arrest and detention of the alien, commands an officer of the Service to deport the alien to the designated place.[26]

Aliens charged with being subject to deportation may be detained only as an incident to actual deportation and must be released if they cannot be deported. *Wong Wing* v. *United States*, 163 U. S. 228, 235; *Saksagansky* v. *Weedin*, 53 F. 2d 13 (C.A. 9, 1931) *Wolck* v. *Weedin*, 58 F. 2d 928 (C.A. 9, 1932); *Ex Parte Matthews*, 277 Fed. 857 (W.D. Wash., 1921); *U. S. ex rel. Chumura* v. *Smith*, 29 F. 2d 287 (W.D. N.Y. 1927). A warrant of deportation which does not indicate the place of deportation is null and void. *Ex Parte Callow*, 240 Fed. 212 (D. Colo. 1916); *Ex Parte Yabucanin*, 199 Fed. 365 (D. Mont. 1912).

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[26] A copy of the form of warrant is contained as Appendix A (p. 72) of the Government's Brief in *Martinez* v. *Neely*, No. 218, October Term, 1952.

In *Ex Parte Callow, supra,* the Court stated:

> "The warrant of deportation directs that the petitioner be returned 'to the country whence he came' . . . He is not without right simply because he is subject to deportation. He cannot be simply sent away. He has a right under the Act to be returned to the country from which he came, and to be protected in that right, the warrant which authorizes the deportation should expressly name the country to which he is to be taken; and that right should not be left to the determination of the officer executing the warrant or to the transportation company which brought him in as their judgment or convenience might dictate."

In *Ex Parte Yabucanin, supra,* the Court stated:

> "It would seem, however, that the warrant of deportation is defective, in that it does not name the country from whence petitioner came and to which he is entitled to be deported. *For this reason, it is uncertain and authorizes deportation nowhere. It must contain specific directions for the protection of the party to be deported and for the information of the deporting authorities and agencies."* (Emphasis supplied.)

In the past the Board of Immigration Appeals has designated the place of deportation in deportation orders. *Vol. III, I. & N. DEC.*, 5; *Vol. II, supra,* 92, 733, 889; *Vol. I, supra,* 20, 137, 143, 209, 290, 343, 352, 403, 422, 485, 490. The 1946 Immigration Manual of the Department of Justice (p. 7101) states that the warrant of deportation must "state the place to which the alien is to be deported." See also: 32 Virginia Law Review 1142.

Designation of the proper place of deportation has always been considered important. *Bellaskus* v. *Crossman,* 164 F. 2d 412 (C. A. 5, 1947), reversed without opinion solely for failure to determine correct place of deportation, 335

U. S. 840 (1948); *Thack* v. *Zurbrick*, 51 F. 2d 634 (C.A. 6, 1931); *U. S. ex rel. Chow Yee Tung* v. *Harrison*, 143 F. 2d 128 (C.A. 2, 1944); *Gorcevich* v. *Zurbrick*, 48 F. 2d 1054 (C.A. 6, 1931); *Wenglinsky* v. *Zurbrick*, 38 F. 2d 985 (C.A. 6, 1935), reversed without opinion with direction that habeas corpus be sustained, 282 U. S. 798 (1930); *U. S. ex rel. Ng Hen* v. *Sisson*, 220 Fed. 538 (S.D. N.Y., 1914).

Section 243(a) of the 1952 Act expressly provides that deportation shall be directed "to a country promptly designated by the alien" if willing to accept him and not prejudicial to public interest. The failure to comply with this statutory requirement renders the warrant void and baseless as authority for the arrest and detention of respondent. *U. S. ex rel. Wiczynski* v. *Shaughnessy*, 185 F. 2d 347 (C.A. 2, 1950); *U. S. ex rel. Harisiades* v. *Shaughnessy*, 187 F. 2d 137 (C.A. 2, 1951).

It is submitted that quite apart from petitioner's lack of statutory authority to detain respondent for deportation pending judicial review and the capricious character of revocation of bail in the absence of security considerations the attempt to detain respondent for deportation in the absence of a determination of a place of deportation is invalid and unconstitutional and should be enjoined.

D. Merits of This Action

Judge Proctor dissented below on the ground that a preliminary injunction should be denied because in his view the conviction for which respondent has been ordered deported involves moral turpitude, and the other asserted grounds for the invalidity of the deportation hearing and the deportation order are not substantial (R. 25-27). The Court below held that the question of detention "is entirely independent of the question who is likely finally to prevail in regard to the validity of the deportation order"

(R. 24). The respondent submits that the Court below was clearly correct in deciding that the constitutional question of the adequacy of the basis for detaining respondent pending judicial review is entirely separate from the questions of the validity of the deportation proceeding and the deportation order. *Carlson* v. *Landon, supra.* The rule that a preliminary injunction should not be granted to a party not likely to succeed on the merits is applicable in property matters and where money damages are recoverable, but is entirely inappropriate where the irreparable damage of imprisonment and loss of personal liberty is involved. Moreover, it is demonstrable that this action does possess merit on several grounds in addition to the ground discussed above that the warrant of deportation is incomplete and invalid.

1. *Unfair hearing.* The complaint alleges that in concluding to deport respondent matters outside the record of the hearing available to respondent and his counsel were considered, including confidential information, communications urging respondent's deportation, and unfavorable newspaper publicity (R. 2-3). The complaint also alleges that the hearing officer who presided at the first hearing recommended that the proceedings be terminated upon the ground that the crime for which respondent was convicted did not involve moral turpitude, but a rehearing was conducted by an officer subject to the control of officials engaged in prosecuting and investigatory functions and that it was this second hearing which resulted in a recommendation of deportation (R. 2). Apart from the validity of the ground of deportation the respondent is entitled to a fair hearing. *Sung* v. *McGrath,* 339 U. S. 33, 50 (1950). Consideration of matters outside the record renders the hearing unfair. *Kwock Jan Fat* v. *White,* 253 U. S. 455 (1920); *Alexiou* v. *McGrath,* 101 F. Supp. 421 (Dist. of Col., 1951).

2. *The crime within five years of entry did not involve moral turpitude.* The complaint alleges that the respondent was admitted for permanent residence on April 3, 1938 and has resided here continuously since that time and has taken one short roundtrip Caribbean cruise from and returning to New York City in April 1939 (R. 1). The fourth and fifth counts of the five count indictment allege conduct on or about October 12, 1943 and thereafter and not within the five year period (166 F. (2d) 249, 251) if the last entry for purposes of computation of the five year period was the 1938 entry, as respondent contended in the administrative proceeding, and not the date of the return to New York City in the course of the Caribbean cruise. The conviction on the first count was reversed (166 F. 2d 257) and not considered as a basis for deportation. The remaining second and third counts charge that just within five years after April 3, 1938 respondent, on February 2, 1943, filed with his local draft board an affidavit signed not by himself but by another officer of companies with which respondent was connected stating the opinion of the other officer that the successful continuance of the operations of the companies depended upon respondent remaining with them, and that it would be impossible to replace him without seriously impairing the drilling program and otherwise seriously hampering the activities of those companies (166 F. 2d 251). In determining that these expressions of opinion concerning future events could be false statements sufficient to support an indictment the Court of Appeals noted, but refused to follow, conflicting decisions concerning the criminal falsity of mere expressions of opinion of future events. *Chaplin* v. *United States*, 157 F. 2d 697 (C.A. D.C., 1946). Where Courts disagree as to whether the affidavit of another person which respondent filed can constitute a crime certainly there is a substantial question whether such a

crime so shocks the conscience of mankind that it can be considered to involve moral turpitude.

Respondent was convicted under Section 11 of the Selective Service and Training Act of 1940 (50 App. U.S.C. 311) for attempting to evade the draft through a claim of occupational deferment. The local draft board rejected the application and no deferment was obtained.

(a.) The Court of Appeals properly refused to pass upon the issue of moral turpitude. In the first place, there are other legal issues presented by this litigation and the case should not be decided piecemeal as the Court below ruled. More important, however, is the fact that a determination of moral turpitude has always required examination of the alien's record of conviction. *U. S. ex rel. Zaffarano* v. *Corsi*, 63 F. 2d 757 (C.A. 2, 1933); *U. S. ex rel. Robinson* v. *Day*, 51 F. 2d 1022 (C.A. 2, 1931); *U. S. ex rel. Mylius* v. *Uhl*, 203 Fed. 152 (S.D. N.Y., 1913), affirmed 210 Fed. 860 (C.A. 2, 1914). Neither the record of conviction nor Rubinstein's immigration file were before the courts below. In its present posture, the case is not yet ripe for adjudication of the moral turpitude issue.

(b.) If the statutory provisions alone of the criminal law (Appendix herein p. 75) violated by Rubinstein constitute the sole basis for a determination of moral turpitude, then it is clear that the crime does not involve moral turpitude. (We believe that when the conviction becomes a part of the present record the same conclusion should be reached.) All crimes do not involve moral turpitude. It is in the depraved criminal intent of the law violator that moral turpitude inheres. *U. S. ex rel Meyer* v. *Day*, 54 F. 2d 336 (C.A. 2, 1931); *U. S. ex rel. Shladzien* v. *Warden*, 45 F. 2d 204 (E.D. Pa., 1930); *U. S. ex rel. Mongiovi* v. *Karnuth*, 30 F. 2d 825 (W.D. N.Y., 1929); *Wasserman, Crimes Involving Moral Turpitude*, March, 1944 Monthly Review, Immigration and Naturalization Service, p. 5.

Rubinstein was a neutral alien who, under accepted principles of international law, could not be required to serve in our armed forces. 4 *Moore International Law Digest* 52; III *Hackworth, Digest of International Law* 603. Upon determination of the respondent's first deportation hearing the Immigration hearing officer concluded that the crime did not involve moral turpitude and stated:

> "I am in doubt that an alien has the same moral obligation to defend the United States against its enemies that a citizen has. The Selective Service Act makes it a crime if he evades in violation of its Section 11. My doubt is greater as to there being a moral obligation on a neutral alien to render such military service. On the contrary, I can imagine several situations in which there would be definite moral obligation on a neutral to remain neutral (for instance, if the neutral were dealing with or connected with the International Red Cross) . . . the respondent seems to have been the victim of bad legal guidance, because if he had done in the first place what he finally did, in filing Form D. S. S. 301, he would have received the exemption as a neutral . . ."

In another case the Immigration Service adopted the same view in *Matter of M.* (File No. 56133/115) when it said:

> "The essence of the alien's crime was his attempt to avoid military service. As a citizen of this country, which he then was, such conduct was reprehensible and deserving of severe punishment. However, when the motives that impel persons to a like course of action are considered, such as religious scruples, cowardice, an innate feeling that they cannot fight against their fatherland, it is difficult to find that such a crime can be described as 'an act of baseness, vileness, or depravity in the private and social duties to his fellow men or to society', one of the commonly accepted definitions of moral turpitude. (See *United States ex rel. Hylius* v. *Uhl*, 203 F. 152, affirmed 210 F. 860)."

The Board of Immigration Appeals on July 21, 1952 in *Interim Decision No. 377, Matter of S . . . . B . . . .* (A 5496423) held that desertion in time of war, a crime punishable by death, did not involve moral turpitude.
The Board declared:

> "Although the death penalty may be imposed as a punishment for the offense, the determinative factor in the imposition of the penalty is the urgency of the situation at the time of the commission of the offense, and not any heinousness inherent in the act itself. We cannot say that the elements of the offense are such that the commission thereof would be commonly regarded as a manifestation of personal depravity or baseness on the part of respondent."

In its opinion in Rubinstein's case, dated December 4, 1952, the Board demonstrated the confusion in the administrative decisions on whether draft evasion involved moral turpitude. The Board overruled its prior decision in *Matter of Galindo,* A-6459196 (unreported) holding that draft evasion did not involve moral turpitude. The Board stated "we believe that draft evasion involved moral turpitude and the contrary holding in the Galindo case is hereby overruled." To reach a determination that this respondent was deportable the Board thus found it necessary to overrule its own decision reaching a different result in the case of another alien.

Thereafter, on August 14, 1953, the Board of Immigration Appeals, again ruled that draft evasion did not involve moral turpitude. *Vasyl Sereda,* Immigration File E. 13567) was a conscientious objector. He was convicted in that he "knowingly failed and refused to report for induction into the military service of the United States."
The Board held:

> " 'All crimes violate some laws; all deliberate crimes involve the intent to do so. Congress could not have

meant to make the willfulness of the act a test; it added as a condition that it must be shamefully immoral' *United States* v. *Day*, 34 F. 2d 920, C.A. 2). It is not the conduct of the individual in question, but the *crime defined by law* that determines whether a conviction involves moral turpitude (*United States ex rel Mylius* v. *Uhl*, 203 Fed. 152, D.C. N.Y. affirmed 210 Fed 680, C.A. 2; *United States ex rel Zaffareno* v. *Corsi*, 63 F. 2d 757, C.A. 2). * * *

To determine if the crime defined involves moral turpitude, we are required to consider what elements must be proven to show guilt (*United States ex rel Mylius* v. *Uhl*, supra.). A review of decisions reveals that to establish a violation, there need be shown (1) there was actual knowledge of the existence of an obligation imposed by law, and (2) a deliberate refusal to comply with that obligation. Malignity of purpose, depravity of disposition or fraud need not be shown. The presence of motivation based on good faith and high principles are all immaterial to the issue raised by the law. (See *United States* v. *Kime*, 188 F. 2d 677, C.A. 7).

A violation of the law in the belief in good faith that it is unconstitutional or that it is detrimental to mankind as a whole is no defense (*Warren* v. *United States*, 177 F. 2d 596, certiorari denied 338 U. S. 947). A finding that one who failed to report for induction has been 'loyal to the United States at all times' will not prevent conviction (*Shigeru Fujii* v. *United States*, 148 F. 2d 298, C.A. 10, certiorari denied, 325 U. S. 868 sub nom *Minola Tamesa* v. *United States*."

* * * * * * *

The element just discussed; the fact that a depraved mind or purpose is not required for conviction; the possibility that conviction may be the result of ill-advice or misclassification; the fact that violation does not necessarily involve fraud and that it is an open act which of necessity is brought to the attention of law enforcement officials and which results not in evasion of service, but punishment, followed by further subjection to

service—all these matters compel the conclusion that the portion of the law under consideration does not define a crime which is base, vile or depraved."

The same may be said about Rubinstein! The immigration laws do not contemplate that "where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon which they were convicted and admit the one and exclude the other" *U.S. ex rel. Mylius* v. *Uhl, supra,* 203 Fed. at 153. The crime of draft evasion does not necessarily require a fraudulent intent as the Board ruled in its most recent decision. In fact, Rubinstein committed no fraud, because fraud requires reliance by the defrauded party and the draft board never gave Rubinstein the occupation deferment which he requested.

The judicial test of moral turpitude is not "anything done contrary to justice, modest, or good morals", a definition cited by the District Court below with apparent approval (R. 9) but rather does the crime "in its nature imply personal depravity or baseness on the part of its perpetrator?" *U.S. ex rel. Mylius* v. *Uhl,* 203 F. 152, 154 (S.D.N.Y., 1913); affirmed 210 F. 860, (C.A. 2, 1914).

A neutral alien such as Rubinstein who was under no obligation to serve and in fact was under a deportation proceeding at the time, who seeks to avoid the military draft is not to be stamped as a depraved person. If one of our citizens sought to evade the draft in Russia, Germany, Italy or Japan or some other country during World War II and was convicted for such offense we would not regard him as depraved. We cannot apply different standards to the alien in our midst.

For the purposes of the present appeal it is neither necessary or appropriate to decide this question finally. On this appeal it is sufficient to determine (1) that the record is incomplete without the judgment of conviction, (2) that

the administrative decisions are contradictory and confused, and (3) there has been no judicial decision on whether the crime of draft evasion by a neutral alien involves moral turpitude subjecting the alien to deportation. It is submitted that in this state of the law the respondent makes out a sufficient case for a preliminary injunction.

E. Propriety of Injunctive Relief

We submit that the Court of Appeals properly granted injunctive relief and that the petitioner has not demonstrated that its decision should be reversed. Rubinstein was not required to establish his case finally and conclusively in order to be entitled to a preliminary injunction. Upon the undenied allegations of the complaint and supporting papers a case for eventual relief was established. Respondent has established the *prima facie* showing necessary for injunctive relief. *Ring* v. *Spina*, 148 F. 2d 647, 654 (C. A. 2, 1945); *Ross Whitney Corp.* v. *Smith Kline & French Laboratories*, 207 F. 2d 190, 194 (C. A. 9, 1953).

1. Injunctive relief is appropriate to restrain an illegal deportation order

In *Stark* v. *Wickard*, 321 U. S. 288 (1944), Mr. Justice Reed speaking for the majority of this Court acknowledged that injunctive relief was appropriate to restrain an executive order fixing milk rates. He said:

> "... the familiar principle that executive officers may be restrained from threatened wrongs in the ordinary courts in the absence of some exclusive alternate remedy will enable petitioners to maintain their suit; but if the complaint does not rest upon a claim of which courts take cognizance, then it was properly dismissed."

Columbia Broadcasting System v. *United States*, 316 U. S. 407 (1942) held that Federal Communications Com-

mission's Regulations alleged to be improper, constituted a sufficient threat of cancellation to petitioner's contracts and therefore sufficient irreparable injury for injunctive relief. The enforcement of illegal orders of cabinet officers was held appropriate for injuctive relief in *Work* v. *Louisiana*, 269 U.S. 250, 254 (1925) and *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 (1902). The threatened imposition and collection of inheritance taxes were held sufficiently imminent to justify injuctive action in *City Bank Co.* v. *Schnader*, 291 U. S. 24 (1934). Here the threat of enforcement of an order of a cabinet officer alleged to be illegal is as immediate, if not more so, as were the cases of *Stark* v. *Wickard, supra*, and *Columbia Broadcasting System* v. *United States, supra*. Threats of incarceration in civil proceedings like deportation are no less sacred than threats of monetary loss. Such threats based upon the enforcement of an illegal deportation order should have similar protection under the injunctive process and our judicial system. The issue then is whether the pleadings show a threatened invasion of a legal right which should be protected by the injunctive process.

It is clear that Rubinstein is entitled to injunctive relief to prevent violation of rights guaranteed to him by the due process clause of the Fifth Amendment of the Constitution. *Eisler* v. *Clark*, 77 F. Supp. 610 (Dist. of Col., 1948); *McGrath* v. *Potash*, 199 F. 2d 166 (C.A. D.C., 1952); *Barber* v. *Yanish*, 181 F. 2d. 492, 196 F. 2d. 53 (C.A. 9, 1952).

In the recent case of *Vergas* v. *Shaughnessy*, 97 F. Supp. 335 (S.D. N.Y., 1951) it was stated as follows:

> "Plaintiff is seeking an injunction pendente lite which if granted would stay all proceedings for deportation until a trial of the action has been had. Section 10 of the Administrative Procedure Act authorizes this relief where it is necessary to prevent irreparable injury. *It may be conceded that if the order of de-*

portation is null and void an arrest on a warrant issued thereunder is irreparable injury and it is no answer to suggest that a party subject himself to arrest and then seek redress by means of the ancient writ of habeas corpus.'' (Italics supplied).

We have shown that the actions threatened herein are illegal and that the order of deportation is invalid if the allegations of the complaint and the present record be accepted.

2. Detention is irreparable damage which equity will prevent

It is self-evident that detention and deprivation of personal liberty is irreparable damage. The modern equity doctrine is that personal and civil rights, as well as property rights, will be protected by injunctive relief. *Perry* v. *Perry,* 190 F. 2d. 601 (C.A. D.C., 1951); *Berrien* v. *Pollitzer,* 165 F. 2d. 21 (C.A. D.C., 1947); *Perkins* v. *Elg,* 99 F. 2d 408 (C.A. D.C., 1938); affirmed 307 U. S. 325 (1939); *Kenyon* v. *Chicopee,* 320 Mass. 528 (1946), 175 A. L. R. 466 (note on equity protection of civil rights); *Reeber* v. *Rossell,* 91 F. Supp. 108 (S.D. N.Y., 1950); *Local 309* v. *Gates,* 75 F. Supp. 620 (D. Ind., 1948); *Myerson* v. *Samuel,* 74 F. Supp. 315 (E.D. Pa., 1947: *Alesna* v. *Rice,* 69 F. Supp. 897 (D. Haw., 1947); *U. E. W.* v. *Baldwin,* 67 F. Supp. 235 (D. Conn., 1946).

The Courts have granted injunctive relief or bail to prevent the irreparable damage of detention pending judicial review of deportation proceedings. *U. S. ex rel. Cammarata* v. *Miller,* 79 F. Supp. 643 (S.D. N.Y., 1948); *Eisler* v. *Clark,* 77 F. Supp. 610 (Dist. of Col., 1948) cert. denied, 338 U. S. 879; *Yanish* v. *Phelan,* 86 Supp. 461 (N.D. Calif., 1949).

3. Balance of equities favor respondent

A court of equity will weigh the equities on either side in determining whether a preliminary injunction should issue. *Perry* v. *Perry, supra, Aldridge* v. *Franco Wyoming Oil Co.*, 9 F.R.D. 278 (D. Del. 1949).

In *Ohio Oil Co.* v. *Conway*, 279 U. S. 813, 815 (1929) the proper rule to be applied in the disposition of preliminary injunction applications was stated as follows:

> "* * * where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction will usually be granted."

The Attorney General, by failing and refusing to suggest any reason for requiring Rubinstein's detention pending judicial review, offers nothing to be weighed in the scales of justice in his favor. On the contrary, the Government's concessions that Rubinstein is not a security risk and that no place of deportation has been determined weigh heavily in respondent's favor. Additional equities of the gravest weight for Rubinstein are that detention for an indefinite period of time pending recourse to the remedy of habeas corpus will be irreparable. Even if damages were available, and they are not, they would not begin to recompense Rubinstein for detention subsequently determined to be unlawful. There are no considerations of public interest whatever advanced by petitioner to be weighed against this irreparable damage of deprivation of personal liberty. In the circumstances the applicable equity rule requires a preliminary injunction.

4. Equity should preserve the status quo and protect acquired jurisdiction

The Administrative Procedure Act of 1946 under which this action is brought expressly authorizes interlocutory injunctive relief. Section 10(d) (5 U.S.C. 1009) provides that "to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings."

Equity will grant an injunction to preserve the status quo existing at the beginning of the litigation, where, as here, a change of status will irreparably damage one party. ***M. K. T. Railway Co.*** v. ***Brotherhood of Railway Trainmen,*** 188 F. 2d 302 (C. A. 7, 1951). In this case, in the absence of an injunction the respondent will not only suffer the irreparable damage of detention, but in addition, for all practical purposes, the jurisdiction of the District Court for the District of Columbia will be ousted. [See: *Kaminer* v. *Clark,* 177 F. 2d 51 (C. A. D. C. 1949)]. This action might become moot and Rubinstein would be relegated to habeas corpus in the district where he is arrested and detained. In these circumstances the status quo should be preserved by preliminary injunction. *Kline* v. *Burke Construction Co.,* 260 U. S. 226 (1922); 28 *Am. Jur.* pp. 404, 409.

5. Duplication of suits should be prevented

Equity will grant an injunction to prevent an unnecessary duplication of suits. *Foodfair Stores* v. *Square Deal Market,* 187 F. 2d. 219 (C. A. D. C., 1951). Under this rule an injunction is appropriate here to prevent a second action

in habeas corpus to obtain the same relief first sought in this action.

6. *Equity should intervene to prevent an abuse of discretion*

The undenied allegation of paragraph 10 of the affidavit of counsel herein, submitted in support of the application for a preliminary injunction is as follows (R. 5):

> "That in all similar cases, the defendant has authorized the continuation of bail for persons similarly situated during judicial review, and defendant's denial of the continuation of bail herein constitutes an abuse of discretion."

This allegation has not been controverted. The Court must therefore at this state of the record proceed upon the assumption that there is such a general practice. (See footnote 23, *supra*, for illustrations of this practice). It follows from *U. S. ex rel. Knauff* v. *Shaughnessy*, 181 F. 2d 839 (C. A. 2, 1950) that the failure of the Attorney General to follow his general practice in the instant case constitutes an abuse of discretion. In the *Knauff* case the Second Circuit Court of Appeals held.[27]

> "8 U. S. C. A. § 154 gives the Attorney General discretion to determine when 'immediate deportation is not . . . proper'. By the adoption of an 'invariable practice,' he has established a class of situations with respect to which he has always so exercised that discretion as to suspend deportation. That classification is entirely reasonable. To depart from it in a single instance is to act arbitrarily or capriciously, to abuse the administrative discretion."

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[27] On the subsequent appeal, 182 F. 2d 1020, Mr. Justice Jackson granted a stay of deportation pending a petition for certiorari, subsequently granted, 340 U. S. 940. In his opinion dated May 17, 1950 granting the stay, Mr. Justice Jackson stated: "Nothing has been produced to show why this particular petitioner should be so discriminated against" [deported pending judicial review]. (Opinion not officially reported but conveniently printed in *The Ellen Knauff Story*, pp. 152, 154.)

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Petitioner's conduct in seeking to detain respondent during judicial review is illegal as we have shown, and should be restrained by the intervention of equity's injunctive remedies.

Conclusion

Essentially and stripped of procedural aspects, the fundamental question presented on this interlocutory appeal is whether petitioner can detain Rubinstein "for deportation" pending judicial review of the deportation order, or whether Rubinstein must be in custody for six months before he can even question the validity of the order directing his deportation, even though:

1. Concededly Rubinstein is not a security risk.
2. Concededly the Attorney General does not intend to attempt deportation pending judicial review.
3. Concededly no place of deportation has been determined.
4. No public interest will be served by Rubinstein's detention pending judicial review.
5. No express statutory authority to detain pending judicial review exists.
6. Detention will make moot in this case the issue of legality of detention pending judicial review and relegate respondent to habeas corpus in which petitioner has argued in effect that the legality of detention pending judicial review cannot be raised.

Happily under our system of a government of laws and not of men, examples are not lacking of judicial intervention to prevent the executive from acting arbitrarily as both judge and jury and depriving an individual of his liberty. *Duncan* v. *Kakanamoku*, 327 U. S. 304 (1946); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886); *Ex parte Milligan*, 4 Wall. 2, 120 (1866). This is not the first time this re-

spondent has been forced to seek judicial protection against *unreasonable and oppressive executive action*. In one instance the executive sought to exact bail of $1,000,000 as the condition of Rubinstein's liberty pending trial. *U. S. ex rel. Rubinstein* v. *Mulcahy*, 155 F. 2d 1002 (C. A. 2, 1946).

In the *Knauff* case, cited *supra*, in which the alien was finally released after suffering the irreparable damage of detention for a total period of more than a year, Mr. Justice Jackson granted a stay pending certiorari (340 U. S. 940) and used language applicable here (not officially reported but contained in the *Ellen Knauff Story*, p. 152):

> "It may well be that this removal will be sustained. But to consummate it while the right to do so is in litigation cannot be permitted, and to attempt to do so after a bill to forbid it has already passed one House by unanimous vote and while it is pending in the other is alleged to be a most unusual departure from administrative practice. Nothing has been produced to show why this particular petitioner should be discriminated against. To stand between the individual and arbitrary action by the Government is the highest function of this Court."

The order of the Court of Appeal should be affirmed.

Respectfully submitted,

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APPENDIX

Statutes and Regulations Involved

The Declaratory Judgment Act, 28 U. S. C. 2201, directs that:

> "In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment and shall be reviewable as such."

Rule 57 of the Rules of Civil Procedure provides in part:

> "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

Section 10 of the Administrative Procedure Act, 60 Stat. 243; 5 U. S. C. 1009, provides in part as follows:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute shall be entitled to judicial review thereof.
>
> (b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas

corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

* * * * * * *

Section 10 (d) of the Administrative Procedure Act, 60 Stat. 243; 5 U. S. C. 1009 (d) provides in part:

"Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings."

Section 12 of the Administrative Procedure Act, 60 Stat. 244; 5 U. S. C. 1011, provides in part:

"No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly."

Section 242 (a) of the Immigration and Nationality Act of 1952 (66 Stat. 208; 8 U. S. C. 1252-a) provides as follows:

"*Pending a determination of deportability* in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General *and pending such final determination of deportability*, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or here-

after authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceeding against him *and detained until final determination of his deportability.* Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole *pending final decision of deportability* upon a conclusive showing in *habeas corpus* proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien *to determine deportability.*"

Section 242 (c) of the Immigration and Nationality Act of 1952 (66 Stat. 210; 8 U. S. C. A. 1252-c) reads in part as follows:

"When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or *if judicial review is had, then from the date of the final order of the court,* within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond, in an amount and containing such conditions as the Attorney General may prescribe, or released on such other conditions as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in *habeas corpus* proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period."

Section 405 (a) of the Immigration and Nationality Act of 1952 (66 Stat. 280; 8 U. S. C. 1101, footnote) provides in part:

> "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or status, condition right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect."

Section 11 of the Selective Training and Service Act of 1940 (50 App. U. S. C. 311) provides in part as follows:

> Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules

regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

JANUARY 11, 1954.

Per Curiam Decisions.

No. 300. BROWNELL, ATTORNEY GENERAL, *v.* RUBINSTEIN. Certiorari, 346 U. S. 870, to the United States Court of Appeals for the District of Columbia Circuit. Argued January 7–8, 1954. Decided January 11, 1954. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Robert W. Ginnane* argued the cause for petitioner. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop. Edward J. Ennis* argued the cause for respondent. With him on the brief were *Jack Wasserman* and *Lemuel B. Schofield.* Reported below: 92 U. S. App. D. C. 328, 206 F. 2d 449.